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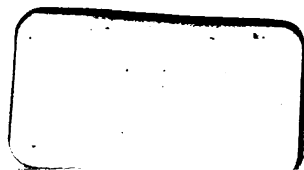
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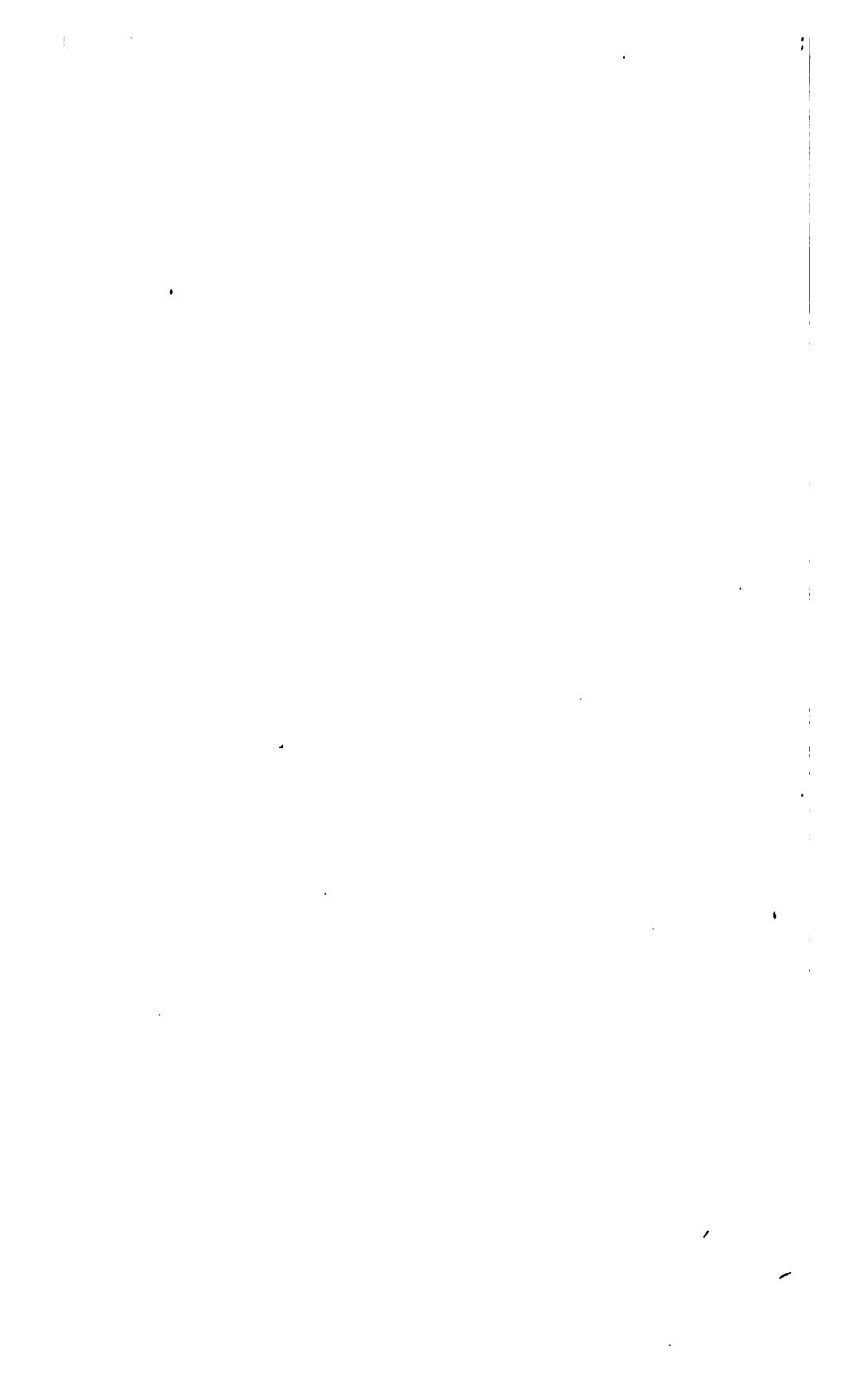
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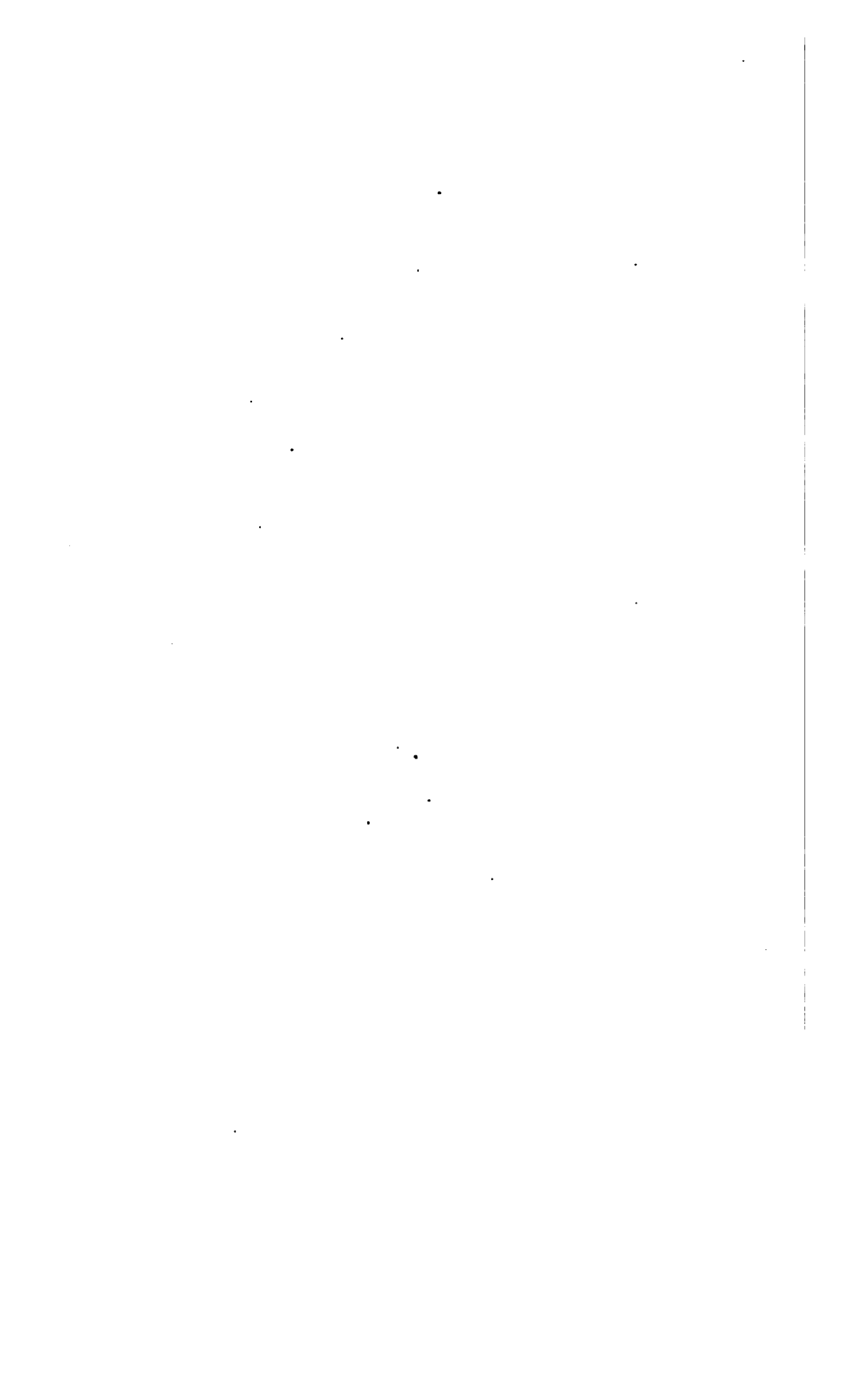
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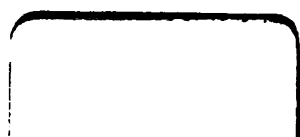
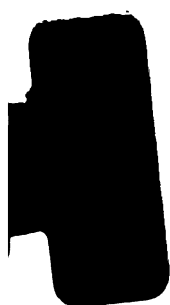


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A. D. could report





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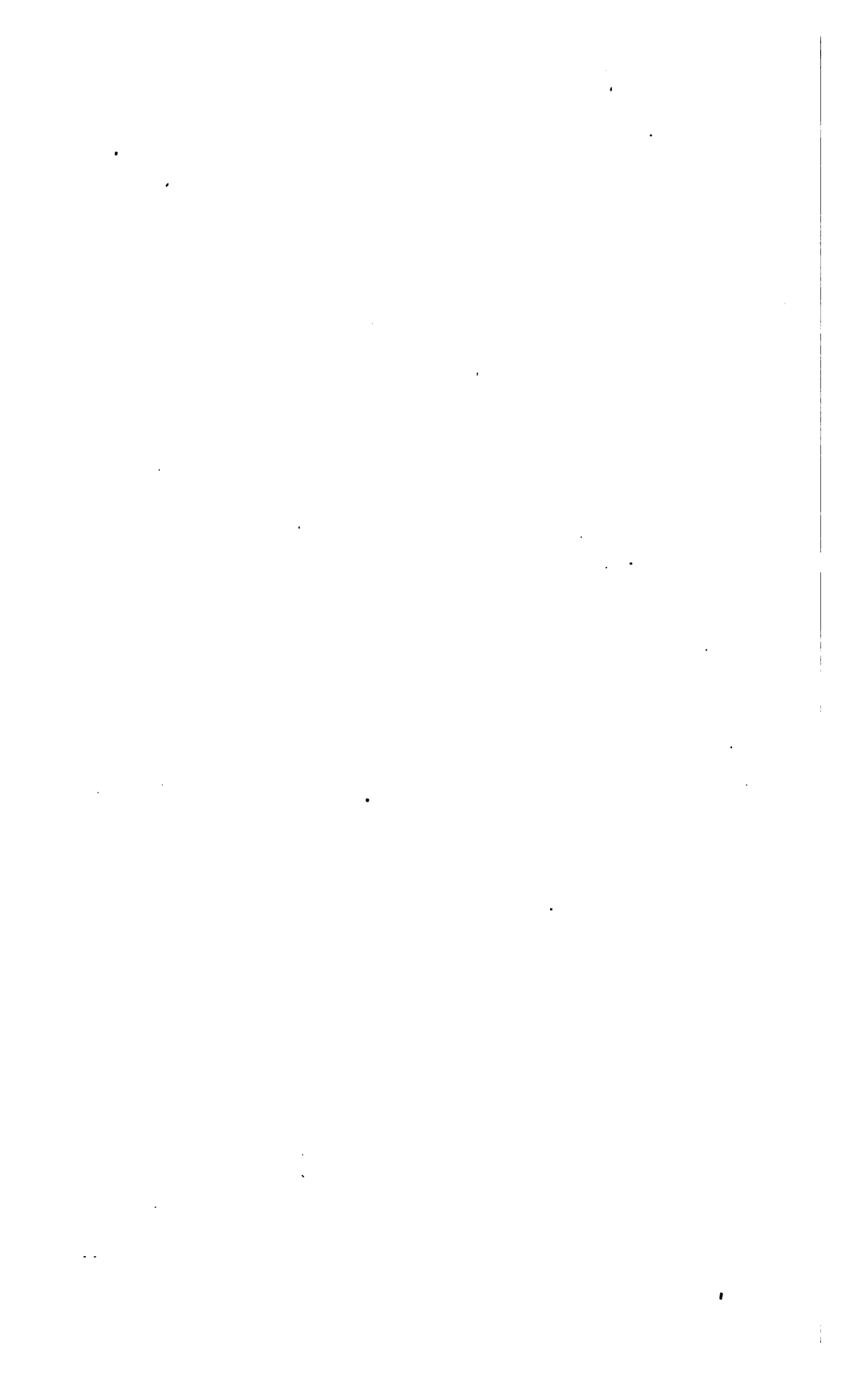
P R E F A C E .

THIS volume includes a part of the cases tried in the First Circuit since the autumn of 1851. In making the selection, I have endeavored to insert only those which might be useful to the profession. A few of those which turned wholly on the local law of a particular State, I have inserted in accordance with the wishes of gentlemen of the Bar of those States.

WASHINGTON, January 16th, 1854.

a*

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CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MASSACHUSETTS DISTRICT, OCTOBER TERM, 1851.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. PELEG SPRAGUE, District Judge.

UNITED STATES vs. JAMES MCGLUE.

A blow, with a dangerous weapon, calculated to produce, and actually producing, death, if struck without such provocation as reduces the crime to manslaughter, is deemed by the law malicious, and the killing is murder.

The accused must be presumed to be sane till his insanity is proved.

It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act; if he knew it was wrong and deserved punishment, he is responsible.

Experts are not allowed to give their opinions on the case, where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon.

If a person suffering under *delirium tremens*, is so far insane as not to know the nature of his act, &c., he is not punishable.

If a person, while sane and responsible, makes himself intoxicated, and, while intoxicated, commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible.

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The law does not presume insanity arose from any particular cause; and if the government asserts that the prisoner was guilty, though insane, because his insanity was drunken madness, this allegation must be proved.

THIS was an indictment for the murder of Charles A. Johnson, first officer of the bark Lewis, of Salem, by the second officer of the bark. One count alleged the offence to have been committed on the high seas, and another in a bay within the dominions of the Imaum of Muscat, a foreign prince or sovereign. The facts, so far as they are necessary to raise the questions of law, appear in the charge to the jury.

CURTIS, J. The prisoner is indicted for the murder of Charles A. Johnson. It is incumbent on the government to prove, beyond reasonable doubt, the truth of every fact in the indictment, necessary, in point of law, to constitute the offence. These facts need not be proved beyond all possible doubt. But a moral conviction must be produced in your minds, so as to enable you to say that, on your consciences, you do verily believe their truth. These facts are in part controverted, and, in part, as I understand the course of the trial, not controverted; and it will be useful to separate the one from the other. That there was an unlawful killing of Mr. Johnson, the person mentioned in the indictment, by means substantially the same as are therein described; that the mortal wound, immediately producing death, was inflicted by the prisoner at the bar; that this wound was given, and the death took place on board of the bark Lewis, a registered vessel of the United States, belonging to citizens of the United States; that Johnson was the first, and the prisoner the second, officer of that vessel, at the time of the occurrence; that the vessel at that time was either on the high seas, as is charged in one count, or upon waters within the dominion of the

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Sultan of Muscat, a foreign sovereign, as is charged in another count; and that the prisoner was first brought into this district after the commission of the alleged offence;—do not appear to be denied, and the evidence is certainly sufficient to warrant you in finding all these facts. They are testified to by all the witnesses. It is not upon a denial of either of these facts that the defence is rested; but upon the allegation, by the defendant, that, at the time the act was done, he was so far insane as to be criminally irresponsible for his act. And this brings you to consider the remaining allegation in the indictment which involves this defence. It is essential to the crime of murder that the killing should be, from what the law denominates malice aforethought; and the government must prove this allegation. But it is not necessary to offer evidence of previous threats, or preparation to kill, or that there was a previously premeditated design to kill.

These things, if proved, would be evidence of malice, and proof of this kind is one of the means of sustaining the allegation of malice. But, besides this direct evidence, of what is called in the law express malice, malice may also be inferred, or implied, from the nature of the act of the accused. If a person, without such provocation as the law deems sufficient to reduce the crime to manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce and actually producing death, the law deems the act malicious, and the offence is murder. The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequence of his act was death, he meant to kill; and if he so intended, in the absence of such provocation as the law considers sufficient to account for that intent, from the infirmity of human passion, then it is to be inferred that malice existed, and that from that feeling the act was done.

In other words, an intention to kill unlawfully, without sufficient provocation, is a malicious intention, and if the intent is executed, the killing is, in law, from malice aforethought, and is murder.

Keeping these principles in view, you will proceed to inquire what the evidence is of a premeditated design to kill; and secondly, whether the act of killing, and the circumstances attending it, were such that malice is to be inferred therefrom. The only evidence, at all tending to show premeditated design, is given by the master of the vessel, and by Saunders, the cabin-boy. The master states that, in a previous part of the voyage, four or five weeks before the time in question, while the vessel was in port, and he himself was absent on shore, some difficulty occurred between the first and second officer, in consequence of which the latter applied to him for his discharge. The witness does not know any thing of the nature or extent of the difficulty, nor of the feeling to which it gave rise in the breast of either party to it, saving that it produced, in the prisoner, a reluctance to continue under the command of the first officer. His discharge was refused; and there is no evidence of any further quarrel between them. It is also sworn by the master and the cabin-boy, that when Mr. Johnson fell, after being stabbed by the prisoner, some of the crew raised him up, and the prisoner said, It is of no use; I meant to kill him, and I have done it. These expressions are not testified to by any of the crew. In such a scene, it is in accordance with experience, that some witnesses may observe and remember what other witnesses either did not hear or attend to, or have forgotten. And, therefore, when these two witnesses swear to this expression, if you consider they are fair witnesses, and intend to tell the truth, they should be believed in this particular, although others present do not confirm their statement.

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But, at the same time, upon this question of malice, it does not seem to me the expressions, if used, are important, because they only declare in words what the act of the defendant, in its nature and circumstances, evinces with equal clearness. It is testified, by all the witnesses present at the time, that the vessel being at anchor about three miles from the shore of the Island of Zanzibar, orders were given by the master to get under way ; that the first officer was forward, on the house over the forecastle, attending to his duty ; that the crew were variously employed in preparations to make sail ; and that the prisoner, being aft, ran forward, jumped on to the house, seized Mr. Johnson by the collar with his left hand, and with his sheath knife, which he held in his right hand, stabbed him in the breast, and he dropped dead. When the prisoner seized him, Mr. Johnson said, What do you mean ? and the prisoner, at the instant he struck the blow, replied, I mean what I am doing.

Now, gentlemen, if you believe this statement, and there is certainly no evidence in the case to contradict or vary it, every witness concurring with the rest in the substance of it, there can be no question that the killing was malicious, provided the prisoner was, at the time, in such a condition as to be capable, in law, of malice. If you are satisfied the prisoner designedly stabbed Mr. Johnson with a knife, in such a manner as was likely to cause and did cause death, no provocation whatsoever being given at the time, then, in point of law, the killing was from malice aforethought, unless you should also find that the prisoner, when he did the act, was so far insane as to be incapable in law of entertaining malice ; for the rules of law concerning malice are all based upon the assumption, that the person who struck the blow was at the time in such a state of mind as to be responsible, criminally, for his act. If he

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was then so insane that the law holds him irresponsible, it deems him incapable of entertaining legal malice ; and, therefore, no malice is, in that case, to be inferred from his act, however atrocious it may have been. And, undoubtedly, one main inquiry in this case is, whether the prisoner, when he struck the blow, was so far insane as to be held by the law irresponsible for intentionally killing Mr. Johnson.

Some observations have been made, by the counsel on each side, respecting the character of this defence. On the one side, it is urged upon you, that the defence of insanity has become of alarming frequency, and that there is reason to believe it is resorted to by great criminals, to shield them from the just consequences of their crimes, when all other defences are found desperate ; that there exist in the community certain theories, concerning what is called moral insanity, held by ingenious and zealous persons, and brought forward on trials of this kind, tending to subvert the criminal law, and render crimes likely not to be punished, somewhat in proportion to their atrocity. On the other hand, the inhumanity, and the intrinsic injustice of holding him guilty of murder, who was not, at the time of the act, a reasonable being, have been brought before you in the most striking forms.

These observations of the counsel, on both sides, are worthy of your attention, and their just effect should be to cause you to follow, steadily and carefully and exactly, the rules of law upon this subject. The general question, whether the prisoner's state of mind, when he struck the blow, was such as to exempt him from legal responsibility, is a question of fact for your decision ; the responsibility of deciding which rightly rests upon you alone. But there are certain rules of law, which you are bound to apply, and the Court, upon its responsibility, is to lay down ; and

these rules, when applied, will conduct you to the only safe decision; because these rules will enable you to do what you are sworn to do, that is, to render a verdict according to the law and the evidence given you.

You will observe, then, that this defence of insanity is to be tested and governed by principles of law, and is to be made out in accordance with legal rules. No defendant can be rightly acquitted of a crime by reason of insanity, upon any loose, general notions which may be afloat in the community, or even upon the speculations of men of science. In a court of justice, these must all yield to the known and fixed rules which the law prescribes. And I now proceed to state to you such of them as are applicable to this case.

The first is, that this defendant must be presumed to be sane till his insanity is proved. Men, in general, are sufficiently sane to be responsible for their criminal acts. To be irresponsible because of insanity, is an exception to that general rule. And before any man can claim the benefit of such an exception, he must prove that he is within it.

You will therefore take it to be the law, that the prisoner is not to be acquitted, upon the ground of insanity, unless, upon the whole evidence, you are satisfied that he was insane when he struck the blow.

The next inquiry is, what is meant by insanity — what is it which exempts from punishment, because its existence is inconsistent with a criminal intent? Clearly, it is not every kind and degree of insanity which is sufficient. There have been, and probably always are, in the world, instances of men of great general ability, filling, with credit and usefulness, eminent positions, and sustaining through life, with high honor, the most important civil and social relations, who were, upon some one topic or subject, unquestionably insane. There have been, and undoubt-

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edly always are, in the world, many men whose minds are such, that the conclusions of their reason and the results of their judgment, tested by those of men in general, would be very far astray from right. There are many more, whose passions are so strong, and whose conscience and reason and judgment are so weak, or so perverted, that not only particular acts, but the whole course of their lives, may, in some sense, be denominated insane. And there are combinations of these, or some of these deficiencies, or disorders, or perversions, or weaknesses, or diseases. They are an important, as well as a deeply interesting study; and they find their place in that science which ministers to diseases of the mind, and which, in recent times, has done so much to alleviate and remove some of the deepest distresses of humanity. But the law is not a medical or a metaphysical science. Its search is after those practical rules which may be administered, without inhumanity, for the security of civil society, by protecting it from crime. And, therefore, it inquires, not into the peculiar constitution of mind of the accused, or what weaknesses, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had, it punishes him; if not, it holds him dispunishable. And it supplies a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is, the capacity to distinguish between right and wrong, as to the particular act with which the accused is charged. If he understands the nature of his act; if he knows his act is criminal, and that if he does it, he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory

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and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is criminal and deserving punishment, then he is not responsible.

This is the test which the law prescribes, and these are the inquiries which you are to make on this part of the case — Did the prisoner understand the nature of his act when he stabbed Mr. Johnson? did he know he was doing wrong, and would deserve punishment? Or, to apply them more nearly to this case — Did the prisoner know that he was killing Mr. Johnson; that so to do was criminal and deserving punishment? If so, he had the criminal intent necessary to convict him of the crime of murder, and he cannot be acquitted on the ground of insanity. It is not necessary here to consider a case of a person killing another under a delusive idea, which, if true, would either mitigate or excuse the offence, for there is no evidence pointing to any such delusion.

It is asserted by the prisoner, that when he struck the blow he was suffering under a disease known as *delirium tremens*. He has introduced evidence tending to prove his intemperate drinking of ardent spirits during several days before the time in question, and also certain effects of this intemperance. Physicians of great eminence, and particularly experienced in the observation of this disease, have been examined on both sides. They were not, as you observed, allowed to give their opinions upon the case; because the case, in point of fact, on which any one might give his opinion, might not be the case which you, upon the evidence, would find; and there would be no certain means of knowing whether it was so or not. It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts; and, therefore, the counsel on each side have put to the physicians such states of fact

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as they deem warranted by the evidence, and have taken their opinions thereon. If you consider that any of these states of fact put to the physicians are proved, then the opinions thereon are admissible evidence, to be weighed by you. Otherwise, their opinions are not applicable to this case. And here, I may remark, gentlemen, that, although, in general, witnesses are held to state only facts, and are not allowed to give their opinions in a court of law, yet this rule does not exclude the opinions of those whose professions and studies, or occupations, are supposed to have rendered them peculiarly skilful concerning questions which arise in trials, and which belong to some particular calling or profession. We take the opinions of physicians in this case for the same reason we resort to them in our own cases out of court, because they are believed to be better able to form a correct opinion, upon a subject within the scope of their studies and practice, than men in general, and, therefore, better than those who compose your panel. But these opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict. Besides these opinions, upon cases assumed by the counsel, which you may find to correspond more or less nearly with the actual case on trial, the physicians have also described to you the symptoms of the disease of *delirium tremens*. They all agree that it is a disease of a very distinct and strongly marked character, and as little liable to be mistaken as any known in medicine. All the physicians have described it substantially in the same way. I will read to you from

my notes that given by Dr. Bell. He says the symptoms are :

1. Delirium, taking the form of apprehensiveness on the part of the patient. He is fearful of something, — fears pursuit by officers or foes. Sometimes demons and snakes are about him. In the earlier stages, in attempting to escape from his imaginary pursuers, he will attack others as well as injure himself. But he is much more apprehensive of receiving injury, than desirous of inflicting it, except to escape. He is generally timid and irresolute, and easily pacified and controlled.

2. Sleeplessness. I believe *delirium tremens* cannot exist without this.

3. Tremulousness, especially of the hands, but showing itself in the limbs and the tongue.

4. After a time sleep occurs, and reason thus returns. I do not recall any instance in which sleep came on in less than three days, dating from the last sleep. At first it is rather broken, not giving full relief; and this is followed by very profound sleep, lasting six or eight hours, from which the patient awakes sane.

Dr. Stedman, who, from his care of the Marine Hospital at Chelsea, and of the City Hospital at South Boston, has had great experience in the treatment of this disease, after describing its symptoms substantially as Dr. Bell did, says its access may be very sudden, and he has often known it first manifest itself by the patients attacking those about them, regarding them as enemies; that it is in accordance with his experience, that a case may terminate within two days of the time when the delirium first manifests itself, and that it rarely lasts more than four days; that he has arrested the disease in forty-eight hours by the use of sulphuric ether.

Taking along with you these accounts of the symptoms

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and course and termination of this disease, you will inquire whether the evidence proves these symptoms existed in this case; and whether the previous habits and the intemperate use of ardent spirits, from which this disease springs, are shown; and whether the recovery of the prisoner corresponded with the course and termination of the disease of *delirium tremens*, as described by the physicians.

In respect to the previous intemperance of the prisoner, and the symptoms, course, and termination of the disease, you are to look to the accounts of the conduct and acts of the prisoner, given by his shipmates. Their testimony will be fresh in your recollection, and it is not necessary for me to detail it. How recently before the homicide had he slept? Was his demeanor, for two or three days previous, natural, or was he restless? Was any tremor of the hands or limbs visible, and if so, was it very marked or not? Did he utter any exclamations manifesting apprehensiveness before or immediately after the act? When, and under what circumstances, did he recover his reason, if he was delirious, and especially did he recover it without sleep? These are all important inquiries to be made by you, and answered, as a careful consideration of the evidence may convince you they should be answered.

It is not denied, on the part of the government, that the prisoner had drank intemperately of the ardent spirit of the country during some days before the occurrence. But the District Attorney insists, that he had continued so to drink, down to a short time before the homicide; and that when he struck the blow it was in a fit of drunken madness. And this renders it necessary for me to instruct you concerning the law upon the state of facts, which the prosecutor asserts existed.

Although *delirium tremens* is the product of intemperance, and therefore in some sense is voluntarily brought

on, yet it is distinguishable, and by the law is distinguished, from that madness which sometimes accompanies drunkenness.

If a person suffering under *delirium tremens* is so far insane as I have described to be necessary to render him irresponsible, the law does not punish him for any crime he may commit.

But if a person commits a crime under the immediate influence of liquor, and while intoxicated, the law does punish him, however mad he may have been. It is no excuse, but rather an aggravation of his offence, that he first deprived himself of his reason before he did the act. You will easily see that there would be no security for life or property, if men were allowed to commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings. And, therefore, it is an inquiry of great importance in this case, and, in the actual state of the evidence, I think, one of no small difficulty, whether this homicide was committed while the prisoner was suffering under that marked and settled disease of *delirium tremens*, or in a fit of drunken madness. My instruction to you is, that if the prisoner, while sane and responsible, made himself intoxicated, and while intoxicated committed a murder by reason of insanity, which was one of the consequences of that intoxication, and one of the attendants on that state, then he is responsible in point of law, and must be punished. This is as clearly the law of the land as the other rule, which exempts from punishment acts done under *delirium tremens*. It may sometimes be difficult to determine under which rule, in point of fact, the accused comes. Perhaps you will think it not easy to determine it in this case. But it is the duty of the jury to ascertain from the evidence on which side of the line this case falls, and to decide accordingly. It

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may be very material for you to know on which party is the burden of proof in this part of the case. I have already told you, that it is incumbent on the prisoner to satisfy you he was insane when he struck the blow; for the reason that, as men in general are sane, the law presumes each man to be so till the contrary is proved. But if the contrary has been proved; if you are satisfied the prisoner was insane, the law does not presume his insanity arose from any particular cause; and it is incumbent on the party which asserts that it did arise from a particular cause, and that the prisoner is guilty, by law, because it arose from that cause, to make out this necessary element in the charge to the same extent as every other element in it. For the charge then assumes this form,—that the prisoner committed a murder, for which, though insane, he is responsible, because his insanity was produced by, and accompanied a state of intoxication. In my judgment, the government must satisfy you of these facts, which are necessary to the guilt of the prisoner in point of law, provided you are convinced he was insane. You will look carefully at all the evidence bearing on this question, and if you are convinced that the prisoner was insane, to that extent which I have described as necessary to render him irresponsible, you will acquit him; unless you are also convinced his insanity was produced by intoxication, and accompanied that state; in which case you will find him guilty.

The prisoner was acquitted.

Lunt, District Attorney, for the United States.

R. Choate and *Northend*, for the prisoner.

J. VINCENT BROWNE, in Error, vs. THE UNITED STATES.

The payment of navy and privateer pensions, under the orders of the Secretary of the Navy, does not constitute the person paying them *an officer* of the United States; and if the person thus disbursing public money at the same time holds the office of Navy Agent, he cannot be allowed any extra pay or emolument for making such disbursement.

THIS was a writ of error to the District Court of the District of Massachusetts. An action was brought by the United States against the plaintiff in error, to recover of him a balance of \$1,164.75, alleged to be due from him as Navy Pension Agent. The bill of exceptions was as follows:—

At the trial of the cause before the jury, the plaintiffs claimed to recover of the defendant, late Navy Pension Agent, at Boston in Massachusetts, the sum of eleven hundred and sixty-four dollars and seventy-five cents (\$1,164.75.)

This amount had been retained by the defendant, upon the ground that he was entitled to so much, as a commission of two and one half per cent. for disbursing, in the capacity of Navy Pension Agent, the sum of forty-six thousand five hundred and eighty-nine dollars and ninety-two cents (\$46,589.92); and he proved this claim to have been disallowed by the Treasury Department in the defendant's accounts.

The defendant, to maintain the issue on his part, gave evidence that, on the ninth day of October, 1841, he, then being Navy Agent at Boston, under commission dated the twentieth day of September, 1841, was appointed by the Secretary of the Navy agent for paying navy pensions at Boston; that he therefore entered upon the duties of this agency, and continued Pension Agent till the twenty-

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second day of April, 1845, when he was notified of the appointment of his successor; and the second day of May following, when he was directed to pay over the funds of the Navy Pension Agency to his successor, Isaac P. Davis, Esq., who was not Navy Agent at Boston; that the defendant had ceased to be Navy Agent on the first day of April, 1845, when his successor in that office, Isaac Hull Wright, Esq., was appointed; that, during the period of his Navy Pension Agency, he performed all the duties of that office, and received and disbursed the funds of the government to the amount before stated, keeping separate books and separate funds, and rendering separate accounts thereof and of the performance of his duties therein, and conducting all the affairs of his agency under the name of Navy Pension Agent, at Boston; that he received no allowance or compensation for the same, separate from the compensation fixed by law, as Navy Agent; and that the commission charged above was a fair and reasonable compensation for his services as Navy Pension Agent; that he received, during the whole time that he was Navy Agent, the maximum compensation allowed by law for performing the duties of that office. And the defendant thereupon contended that, by law, he was entitled to the sum charged and disallowed, as above, as a fair and reasonable compensation for his services in the office of Navy Pension Agent.

But the judge instructed the jury that, during the time the defendant was Navy Agent, and actually received the maximum compensation allowed by law to that office, he was not entitled to further additional compensation for services rendered by direction of the Secretary of the Navy, as Pension Agent. Whereupon, the defendant excepted to these instructions of the judge, and prayed that his exceptions might be allowed, and they were allowed accordingly. Signed, PELEG SPRAGUE, *Judge.*

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The question was, whether the plaintiff in error was entitled to compensation for the services rendered by him, as Navy Pension Agent, while he held the office and received the compensation of Navy Agent.

It was argued by *R. Choate* and *J. H. Brown*, for the plaintiff in error, and by the *District Attorney* for the United States.

CURTIS, J. The Act of March 3d, 1839, s. 3, (5 Stats. at Large, 349,) provides that no officer, in any branch of the public service, or any other person, whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law.

The Act of August 23d, 1842, (5 Stats. at Large, 510,) passed about ten months after Mr. Browne's appointment, substantially reenacts this law, with some changes of phraseology, apparently designed to render the same more clear, and superadds the requirement, that the appropriation for such additional pay, extra allowance, or compensation, must explicitly set forth that it is made for such object. This latter clause does not seem to be material in this case, for it is not pretended that there is any law of Congress authorizing compensation for the services in question; nor is it denied, that, if this case be within either of these acts, the compensation claimed by the plaintiff in error cannot be allowed. So that the question is, whether the case stated by the bill of exceptions is within either of these acts of Congress. It is clear that Mr. Browne, as Navy Agent, comes within the very broad language of these laws; the words, "no officer in any branch of the public service, or any other person, whose salary, pay,

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or emoluments is or are fixed by law or regulations," certainly include a Navy Agent. He was a person in a branch of the public service, and his emoluments were fixed by law ; for the Act of March 3d, 1809, s. 3, (2 Stats. at Large, 536,) which authorized the President to appoint such agents, provides that their compensation shall not, in any instance, exceed that allowed by law to the purveyor of public supplies, which, by the Act of February 23d, 1795, s. 1, (1 Stats. at Large, 419,) was fixed at two thousand dollars per annum. Not denying that this is so, the counsel for the plaintiff in error argue, that this case is not within the prohibitory Acts either of 1839 or 1842, because those acts are not applicable to a case where the same person holds two distinct offices, and discharges the appropriate duties of each ; and because Mr. Browne did thus hold and discharge the duties of two distinct offices, viz., Navy Agent and Navy Pension Agent.

Both these positions require examination. The office of Navy Agent, though not designated by that name, is authorized by the Act of 1809, above referred to. The President, with the advice and consent of the Senate, is therein empowered to appoint agents, either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the military establishment or of the navy of the United States. No other than this very general description of the duties of this officer is known to me to exist in any law. Upon such appointment a commission issues, which empowers and requires the officer therein denominated a Navy Agent, to perform such duties as shall from time to time be required of him, by the President or the Secretary of the Navy.

To ascertain whether the payment of navy pensions, under the orders of the Secretary of the Navy, constitutes

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a separate office, it is necessary to refer to the acts of Congress on that subject. By the Act of March 3, 1799, s. 9, 10, (1 Stats. at Large, 716,) the money accruing from the sale of prizes was declared to be a fund for the half-pay of such officers and seamen as might be entitled thereto, and for making provision for disabled and meritorious officers and seamen, and it was put under the management of the Secretaries of the Navy, War, and the Treasury.

By the Act of June 26, 1812, s. 17, (2 Stats. at Large, 763,) two per centum of the net amount of prize money arising from captures, or salvage for recaptures, by the private armed vessels of the United States, are directed to be paid to the United States, to be held as a fund for the support and maintenance of persons wounded, and of the widows and orphans of persons slain on board such private armed vessels. And by the Act of July 10, 1832, (4 Stats. at Large, 572,) the former board of trustees are directed to close their accounts, and pay these funds to the Treasurer of the United States, for the use of the Secretary of the Navy, for the payment of navy and privateer pensions; and the Secretary of the Navy is constituted the trustee of such funds, and is authorized to grant and pay the pensions according to the acts of Congress in that behalf, and to keep accounts of receipts and expenditures.

It is under this authority that the Secretary of the Navy required Mr. Browne to receive certain of these funds, and disburse the same in part execution of the trust which, by the last-mentioned law, is incumbent on the Secretary as the trustee of these funds.

It is impossible to maintain that this order of the Secretary is such an appointment to an office as takes the case out of the Acts of 1839 and 1842. In the first place, if such an office as Navy Pension Agent existed by law, the head of a department could not appoint to such office,

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there not being any act of Congress vesting in him that power.¹ In the next place, there is no such office created by law. It must be admitted that Congress, by making the Secretary of the Navy a trustee, and requiring him to take care of and disburse these funds, did, by implication, enable him to employ the necessary instrumentalities to execute the trust; and that, until July 4, 1840, (5 Stats. at Large, 385, s. 6,) when the Receivers-General were required by Congress to pay pensions under the direction of the Secretary, he might use a reasonable discretion in the selection and employment of these instrumentalities. But this falls far short of the creation of an office under the United States. It amounts only to the employment of some person to execute, for the time being, some portion of this trust; but where, or how long, or to what extent, or whether at all, such temporary and occasional agency should exist, is left to the discretion of the head of the department. Now, to allow that this not only constitutes an office, but that a Navy Agent, doing such service, is to be deemed thereby to hold a second and distinct office, and so not to come within the prohibition of these Acts of 1839 and 1842, would simply annul those acts. Because, in every case where extra compensation could be claimed before the Act of 1839, by an officer having a fixed compensation, it must have been claimed for services not within the scope of the official duties of the claimant.² And if it were enough, under these acts, that the claimant had done duty, out of the scope of his office, under a requisition by the head of the department, no cases would be left for these acts, restraining increased compensation, to operate upon. I cannot agree, therefore, to the position that Mr. Browne, as

¹ Constitution, art. 2, s. 2. *United States v. Maurice*, 2 Brock. R. 108.

² *Andrews v. United States*, 2 Story, 208.

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Navy Pension Agent, did hold a separate office under the Constitution and laws of the United States, so as to take his case out of the prohibitions of these laws.

But if he did hold a separate office, created by law, to which he was duly appointed, I should still be unable to come to the conclusion that he is legally entitled to the compensation claimed. Before 1839, the Supreme Court, by a series of decisions, had established the rule, that an officer who rendered services to the government not within the scope of his official duties, was entitled to set off his equitable claims for compensation in an action by the United States, although they were of such a character that the head of a department could not by law allow them.¹ And this principle had been applied to very many cases in the circuits. To the abstract justice of this principle, it would seem there could be no objection; but, apparently, Congress became dissatisfied with its practical application to that class of cases where the officer's compensation is fixed by law or regulations, and therefore enacted these laws of 1839 and 1842. Of the first of these Acts, the Supreme Court, in the case of *Hoyt v. The United States*, 10 How. 141, says: "It is impossible to misunderstand this language, or the purpose and intent of the enactment. It cuts up by the roots these claims by public officers for extra compensation on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. This prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation."

Now, looking at the intention of these acts, and the lan-

¹ *United States v. Wilkins*, 6 Wheat. R. 135; *United States v. McDaniel*, 7 Pet. R. 1; *United States v. Ripley*, 7 Pet. R. 18; *United States v. Fillebrown*, 7 Pet. 28.

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guage employed in them, I am unable to come to the conclusion, that extra compensation can be allowed to an officer, because he has disbursed public money which his office did not require him to disburse. This is all that needs to be decided in this case. The argument at the bar was, that the extra allowance could not mean a compensation fixed by law for discharging all the duties of another and distinct office, and so entitling him *by law* to such compensation. This may be so. But to bring this case within the argument, it must be shown that there is *another* office, which has a compensation attached to it by law, and that the claimant has become entitled to that compensation by performing all its duties, which in this case is not true.

The United States v. Morse, 3 Story's R. 87, was much relied on; but that was decided under another statute, and was the case of a distinct office, having a compensation attached to it by law, and the claimant had discharged its duties. The general observations of Mr. Justice Story concerning the policy of Congress, are in entire accordance with the settled doctrines of the Supreme Court, before the Act of 1839 was brought under its notice; and as he makes no allusion to that act, which, being only one section of an appropriation bill, might well escape his attention, I cannot consider that he had it in view, or intended to embrace it in his general reasoning.

The decision of the learned District Judge, for the Maine District, in *United States v. Jarvis*, is also relied on by the plaintiff in error. But the learned District Judge for this district decided this case the other way. I have not the advantage of knowing the reasons for either of these decisions; and though I have great respect for the opinions of both those learned judges, their decisions, as matter of authority, can have no binding force in this appellate court.

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I have avoided all discussion of one of the questions suggested at the bar, whether the disbursement of these moneys really came within the scope of the official duties of the Navy Agent, and so whether his bond would cover the faithful performance of this duty. It is a question not necessary to be decided in this case, and I give no opinion upon it. My conclusion is, that there was no error in the ruling of the District Judge, and that the following order be entered.

Order.

This cause came on to be heard on the transcript of the record of the District Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs and damages, at the rate of six per cent. per annum.

UNITED STATES vs. ROBERT MORRIS.

Under the Constitution and laws of the United States, the jury are not the judges of the law in a trial for a crime; they are to take the law from the Court, and apply it to the facts which they may find from the evidence, and thus frame their general verdict, of guilty or not guilty.

Under the Act of Congress of August 8, 1846, (9 Stats. at Large, 73, s. 3,) an indictment for a misdemeanor may be remitted to this Court, by an order made at a term subsequent to that to which the indictment is returned, and after the defendant has pleaded, and some proceedings have been had.

It is not a good plea, in bar to an indictment for a misdemeanor, that the case was once committed to a jury, and withdrawn before verdict by order of the Court.

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Though neither party has a right of challenge after a juror is sworn, it is in the discretion of the Court to protect the administration of justice, by investigating, at any stage of the trial, an objection to the impartiality of a jury, and by withdrawing the case from the jury, if any juror is found unfit to sit therein.

The question, whether a person was held to service under the laws of Virginia, is partly a question of *status*, and partly a question of property; and in either aspect, evidence that the person was, in point of fact, held and treated as a slave in Virginia, is admissible, and, if not controlled, sufficient evidence to require the jury to find that he was held to service under the laws of that State.

AN indictment for a misdemeanor was found against the defendant, and returned into the District Court, which, having been removed to this Court, the defendant filed the following plea :—

Circuit Court of the United States for the First Circuit.

MASSACHUSETTS, ss. OCTOBER TERM, 1851. }
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Special Plea. — And now the defendant, after the reading of the indictment, says, that the same indictment was returned by the Grand Jury of the United States to the District Court of the United States for this district, at the March term thereof, last past; that he appeared before said Court, and was duly arraigned to answer to said indictment, at said term, and did plead thereto the plea of Not Guilty; that, thereupon, a jury of twelve men was impanelled to try the issue between him and the United States; that each juror answered, under oath, that he was sensible of no bias, and entertained no opinion which would prevent his finding a verdict against the defendant, if the law and the evidence required it; that the case was opened to the jury by the counsel for the United States, and witnesses were examined in behalf of the prosecution. That, thereupon, the District Attorney moved the Court,

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that he might be permitted to introduce evidence tending to show that one of the jurors had a bias in the case; that the defendant objected to the right of the Court to hear the evidence, but it was allowed, and several witnesses were examined as to the declarations of the juror; and the Court ordered the juror to be withdrawn, and the case to be continued to the next term of said court, without the consent of the defendant, and without any necessity for so doing.

That at the next term of the said court, to wit, the June term, last past, the judge of said court ordered the indictment to be remitted to this court, by an entry on the docket, that, in the opinion of the Court, difficult and important questions of law were involved in the case, and it was so remitted; that no other matters or things were remitted to this court, except the indictment and recognizances; and none of the proceedings in said court were remitted to this court, or appear on record, or on the files of this court.

Wherefore, the defendant says, that he ought not to be required to plead to this indictment; and that he ought not to be tried upon this indictment; and that this court ought not to take further cognizances of this indictment. And he prays the judgment of the Court in the premises.

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To this plea there was a general demurrer, and joinder in demurrer.

The questions of law were argued by the *District Attorney* and *N. J. Lord*, for the United States, and *J. P. Hale*, and *R. H. Dana, Jr.*, for the prisoner. The opinion of the Court was delivered by

CURTIS, J. The first point raised by this plea is, whe-

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ther this indictment has been lawfully remitted to this court, and is now regularly pending here. It is alleged that the District Court had not power, under the act of 1846, c. 98, s. 3, to remit the indictment to this court, for several reasons, the first of which is, that the order to remit was not made at the term when the indictment was presented.

The clause of the statute under which the District Court acted is as follows:—"And the said District Court may, moreover, *in like manner*, remit to the Circuit Court any indictment pending in said District Court, when, in the opinion of the Court, difficult and important questions of law are involved in the case; and the proceedings thereupon shall thereafter be the same in the Circuit Court, as if such indictment had been originally found and presented therein."

It is argued that the direction to remit "in like manner," refers to the manner of remitting capital indictments, provided for just before, in the same section. Of this there can be no doubt. It is further argued, that the "like manner" includes a direction to remit to the next term of the Circuit Court, because capital indictments are to be remitted to the next term of that court. If it were admitted, that the authority to remit "in like manner" is an authority to remit to the next term of the Circuit Court, it would not follow that the remission must be to the term of the Circuit Court next following the presentment of the indictment in the District Court.

The question would still remain, whether the order to remit must be made at the term at which the indictment is presented. The time when such order is to be entered may or may not be considered as part of the "manner" of remitting. Generally, the time of doing an act and the manner of doing an act are distinct things. The phrase,

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at such times and in such manner, is one of very frequent occurrence in legal language, and is strictly correct. Still, it may be that, though not naturally included, Congress intended to embrace the time of entering the order in the words "in like manner;" and therefore it is necessary to look carefully at the different parts of this statute, and see if such was the intention of Congress. When the remission of capital indictments is provided for, the act says, "every indictment for a capital offence *presented* to the District Court, shall, by order entered on the minutes of the court, be remitted," &c. It is not intended that such indictment shall, in a legal sense, be pending in that court which has not power to try them; they are to be presented and then remitted, and the inference is a necessary one, that the order to remit is to be made when presented. But by the clause under consideration, the Court has power to remit any indictment *pending* in that court; from which no such inference, but the contrary, is to be drawn; for indictments are pending only after they are presented, and their pendency continues till finally disposed of. It would seem, therefore, that the words "in like manner" were not intended to embrace the time when the order is to be entered; for in one case it is to be when the indictment is presented, in the other while it is pending. If we look further at the subject-matter of the enactment, we find that the statute says, any indictment pending in the District Court may be remitted, "*when*, in the opinion of the Court, difficult and important questions of law are involved in the case."

The natural meaning of this is, that the order may be made when the Court shall have arrived at the opinion that such questions are involved in the case, and if so, there is no limit of time. When that opinion is formed the time is come, according to the statute, to make the

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order; till it is formed, the time has not come; and whether formed at the first, or any subsequent term, it is equally a compliance with the statute to enter the order.

But it is also contended, that this order must be made before any proceedings have taken place under the indictment, and that to allow a remission after any proceedings would endanger the prisoner's rights, and could not have been intended by Congress. It is undoubtedly true that, to deprive a prisoner on trial for a crime of any substantial right, is so contrary to the general system of our law, that the legislative intention must be expressed with great clearness to induce the Court to suppose that such was the design. But if, on the contrary, very important rights are secured; if the provision is in harmony with other modes of proceeding, which have been long in use and generally approved; and if the worst that can be imagined is not the loss of any right, but merely some danger of inconvenience in some possible cases, it would be going too far for the Court to put a constrained interpretation upon the law, and deny to it its full meaning.

It has already been stated, that the natural meaning of this clause is, that the order to remit is to be made when the Court has arrived at the opinion that difficult and important questions of law are involved in the case, and that the act prescribes no limit of time within which such opinion is to be formed. It may be added, that it is a fair, not to say a necessary inference, from the fact, that the remission is to be made as a consequence of the opinion that difficult and important questions of law are involved in the case; that such proceedings are to take place, as in the ordinary course of things are usually necessary to enable the Court to form such an opinion, and these would certainly include some judicial investigation of the merits of the particular case, or, if there is a class

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of cases, of some one of them. It is suggested that the Court may examine the indictment, and thus ascertain that important and difficult questions of law are involved; but the act does not confine the questions to the indictment; its language is, "questions involved in *the case*." Besides, it is no part of the duty of the Court, or of its ordinary action, and can scarcely be considered judicial, for the Court to inspect indictments to foresee what questions may be raised; and Congress cannot be supposed to have legislated for a class of cases to arise out of the formation, by the Court, of an opinion, in a way which is entirely out of the usual course of judicial action, and which cases, therefore, could not justly be expected to arise at all. The sound construction of the clause is, that this opinion is to be arrived at, as other judicial opinions are, in the usual course of justice, after an issue is made, and the parties so far heard as to develop the questions which exist. The argument of the defendant's counsel proceeds upon the basis that there are to be no proceedings in the District Court, and this assumption is necessary; for if it be conceded that the accused is to be arraigned and plead, the whole basis of the argument must fail. But if there has been no plea, how can the Court know that any question whatever is to arise. The defendant may plead guilty, and so there may be no questions at all.

It is suggested, however, that the construction contended for by the defendant ought to be adopted, because any other affects the rights of the accused, and this is in two ways. First, it is urged that the District Judge may arbitrarily break off a trial after it has begun, and send the case to another court, perhaps for the very purpose of embarrassing the accused; though any intention of imputing such motive in this case is wholly disavowed. Taking a practical view of this argument, it would seem that a defend-

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ant would not be unwilling to get out of a court held by a single judge, who manifested a disposition to oppress him, and whose rulings there is no means whatever of revising; that a judge who had such a disposition would be far more likely to keep the control of the case than to send it to another court. And, taking a legal view of the subject, it is clear that no argument can be drawn from the amount of discretionary authority thus conferred on the judge, because it is in harmony with other provisions of law, and of this very statute, and of the same nature as the powers already possessed by courts of the United States.

By the act of 1792, c. 66, it is provided, that when the judges of the Circuit Court are divided in opinion, the question may be certified to the Supreme Court for decision, and the trial is to proceed or to be broken off, as the Court shall determine. Here there is a discretion vested in the Court to stop the trial or not, as they shall think the merits of the case require, and that for a reason not unlike the one on which the judge is to act, under the clause of the statute now in question.

In all cases within the jurisdiction of the District Court, it is in the power of that court, as it is in the power of the Circuit Court, even in capital cases, to take the case from a jury impanelled to try it, whenever, in the opinion of the Court, it is necessary, or required by the interests of public justice to do so.

The authorities in support of this position will be presently referred to; and although they show that, especially in capital cases, it is a power to be exercised with great caution, yet it exists, and is purely and entirely dependent upon the discretion of the Court; and, by the second section of this very act, the District Court is empowered, on the motion of the District Attorney, to remit to this Court

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an indictment *and the proceedings under it*, as a mere matter of convenience, and when no questions of difficulty and importance are involved. It seems to me, therefore, not improbable that Congress intended to intrust the District Court with a similar discretion, to be exercised upon this class of cases;—where, difficult and important questions of law being involved, there is a moral necessity, and the interests of public justice may require that they should go into a higher court, when, if they prove to be so difficult that a real difference of opinion exists between the two judges, they may be sent to the Supreme Court for a final decision. It is apparent that the prisoner may find great additional security for his rights by this course; and, considering that it is only recently that any criminal jurisdiction was intrusted to the District Court, that it now has an entire criminal jurisdiction except in capital cases, that there is no mode whatever of revising its decisions and giving uniformity to them throughout the country, and that Congress has by this law intended to make a provision to prevent what might otherwise prove to be a serious mischief, I do not feel at liberty to hold that the law shall apply only to cases where no proceedings have been had, which would in effect render it practically almost inoperative, and shall not apply to cases *quæ frequentius accidunt*, where the questions have been developed, as questions ordinarily are developed, by hearing the parties upon a formed issue.

It is urged, however, in the second place, that, inasmuch as under this section no proceedings subsequent to the indictment are to come up to the Circuit Court, it must be supposed that it was intended that no cases should come up in which any proceedings had been had, and that the accused may be injured by having the indictment transferred without the proceedings. This argument is entitled to

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weight, but it is far from being conclusive. It may well be that Congress intended that a case remitted to the Circuit Court, because it involved questions of law so important and difficult, that the interests of public justice and the rights of the immediate parties required that court not to try and determine it, should be tried in the Circuit Court *de novo* from the beginning; this might be an advantage to the prisoner, for it gives him an opportunity to plead anew. But it is suggested that it may, in some cases, be injurious to him, because there may be something on the record below of which he could avail himself by motion, but if the proceedings below do not come up he must plead the matter specially, and thus not only be put in jeopardy of failing upon some technical point, but subjected to a final judgment if he should fail. But, under the laws of the United States, I know of only one matter which must be pleaded specially; that is, a former acquittal or conviction for the same offence; everything else may be given in evidence under the general issue. But if the defendant has been acquitted in the District Court, the indictment is no longer pending there, and so cannot be remitted here; and if it were to be so remitted, the Court would, upon motion and production of the record of the District Court, dismiss it; the defendant would not be put to plead at all. The Court has gone much further than this in *United States v. Coolidge*, 2 Gal. R. And if the defendant were convicted in the District Court, and the case were one in which a new trial can be had, the defendant can have no cause to complain that he gets one by having the case certified here; and if no new trial can be had in a case of felony, upon which I gave no opinion, then the defendant has only to move to dismiss, as in case of acquittal, and he must be discharged.

Lest I should be thought to have overlooked this par-

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ticular case, in what I have said concerning the necessity of pleading specially, I observe that the subject-matter of this plea could not have been availed of in the District Court on motion, any more than here, because the gist of the plea, as put forward by the defendant's counsel, consists of matter of fact not apparent on the record there, viz., that the juror was withdrawn after he had been examined on the *voir dire*, for a cause of challenge not arising subsequent to the impanelling of a jury, the defendant objecting, and that the case was taken from the jury without necessity. Whatever averments the plea contains as to these matters, would be just as much *dehors* the record in that court as in this, and of course would have been so in this court if the whole record had come up.

I am of opinion, therefore, that the natural meaning of the language of this third section empowers the District Court to remit to this court an indictment pending therein at a term subsequent to that when presented, and after any proceedings have been had therein which do not amount to a bar to a future trial; that the subject-matter of the act does not call for a restricted interpretation of its language, and that, therefore, this indictment was properly remitted here, unless the matters contained in the plea amount to a bar to another trial.

Considered as a plea in bar, its substance, as understood by the defendant's counsel, is, that this indictment for a misdemeanor, having been committed to a jury impanelled to try it, was, by order of the Court, taken from this jury, and the case continued without necessity; and that, before this was done, a juror, who had been examined on the *voir dire*, as to his standing indifferent, and who had so answered that he was sworn and sat on the panel, was withdrawn, by order of the Court, upon proof of bias. Supposing this to be just as the defendant's coun-

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sel understands it, I should feel it to be quite impossible to come to the conclusion that the plea is a good bar. I know of no authority for the position that, because a trial for misdemeanor has been broken off in a manner which the defendant avers, and offers to prove to the satisfaction of another court, was irregular, therefore there can be no further trial.

But I do not pause upon this, because I think it clear that when this plea is examined it fails to show any irregularity in the proceedings of the District Court.

The defects alleged consist, first, in withdrawing a juror, and second, in ordering the case to be continued. As to the first, it is contended that the common law does not allow a juror to be challenged after he is sworn, except for causes arising after he is sworn; that here the juror was examined on the *voir dire* as to his bias, was sworn, and then challenged, and evidence of bias allowed to be given, and that this was necessarily the same cause of challenge inquired into on the *voir dire*; that bias is a state of mind, and so the evidence must necessarily have applied to the cause of challenge existing when the juror was sworn. It must be admitted that bias is a state of mind, but it does not necessarily follow that the evidence applied to a cause of challenge existing when the juror was sworn. This assumes that the mind cannot change its state or be changed, and that because the juror stood indifferent when he was sworn, he could not become biased afterwards, which is evidently untrue. There is no averment in this plea that the cause of challenge existed when the juror was sworn, nor that the evidence in support of it related to the state of mind of the juror before he was sworn, and, consequently, upon the rule of the common law, as understood by the defendant's counsel, the plea is bad in this particular. It is not known to me what is the

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truth of the case, or whether, consistently with the truth, the plea could be amended ; but as I have a clear opinion upon the merits of this part of the plea, wholly independent of this defect in it, I think it proper to express it.

The rule of the common law, as shown by the authorities cited by the defendant's counsel, is, that neither party has a right of challenge, after the juror is sworn, for cause then existing. But it by no means follows that it is not in the power of the Court, at the suggestion of one of the parties, or upon its own motion, to interpose and withdraw from the panel a juror utterly unfit, in the apprehension of every honest man, to remain there. Suppose a prisoner on trial for his life should inform the Court that a juror had been bribed to convict him — that the fact was unknown to him when the juror was sworn, and that he had just obtained plenary evidence of it, which he was ready to lay before the Court, is the Court compelled to go on with the trial? Suppose the judge, during the trial, obtains, by accident, personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence, is he bound to hold his peace? In my judgment, such a doctrine would be as wide of the common law as it would be of common sense and common honesty. The truth is, that this rule, like a great many other rules, is for the orderly conduct of business. There must be some prescribed order for the parties to make their challenges, as well as to do almost every thing else in the course of a trial. As matter of right, neither party can deviate from this order. And it is the duty of the Court to enforce these rules, which are for the general good, even if they occasion inconvenience and loss in particular cases. But there goes along with all of them the great principle, that being designed to promote the ends of justice, they shall not be used utterly to subvert

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and defeat it ; being intended as a fence against disorder, they shall not be turned into a snare ; they do not tie the hands of the Court, so that when, in the sound discretion of the Court, the public justice plainly requires its interposition, it may not interpose ; and it would be as inconsistent with authority as with the great interests of the community, to hold the Court restrained.

A very eminent English judge has treated this rule concerning challenges just as I believe it should be treated. Chief Justice Abbott says, " I have no doubt that if, from inadvertence, or any other cause, the prisoner or his counsel should have omitted to make the challenge at the proper moment, the strictness of the rule which confines him to make the challenge before the officer begins to administer the oath, would not be insisted on by the Attorney-General, or, if insisted on by him, would not be allowed by the Court. [The Derby case, Joy on Confessions, &c. 220.] That is, like other rules of procedure in trials, it is in the power of the Court to dispense with it when justice requires.

But the interposition of the Court may be placed on even higher ground, supported by authority which in this court is decisive. In *United States v. Percy*, 9 Wheaton, R. 579, the question came before the Supreme Court, whether it was in the power of the Circuit Court to discharge a jury in a capital case, and afterwards put the prisoner on trial by another jury. The distinction between capital cases and misdemeanor, under the provision of the Constitution of the United States, cited by the defendant's counsel, is very plain ; yet, speaking even of capital cases, the Court say, " We think that, in all cases of this nature, the law has invested courts of justice with authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration,

there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere."

That a Court would interfere far more readily in a case of misdemeanor there can be no doubt, and it is so asserted in terms by Story, J., in *United States v. Coolidge*, 2 Gall. 364. In *United States v. Shoemaker*, 2 McLean, 114, and *United States v. Gibert*, 2 Sumn. 19, it will be found that Justices Washington, Story, and McLean, have all acted in their circuits upon these principles. Now, if the Court has such a discretion; and if, as the Supreme Court say, it is to be exercised even in capital cases, where the ends of public justice would otherwise be defeated, what case can be imagined more fit for its interposition than one where the Court finds that a juror is so biased, either against the prisoner or the government, that he is unfit to sit in the cause? The truth is, that it is an entire mistake to confound this discretionary authority of the Court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case. I hazard nothing in saying, that no such right is known to the common law. This disposes of the other allegation in the plea, that the case was taken from the jury and continued without necessity, for, in the language of the Supreme Court, already cited, if there is no necessity, strictly speaking, yet if, in the opinion of the Court, taking all the circumstances into consideration, the ends of public justice would otherwise be defeated, then even a

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capital case may be taken from a jury, and *à fortiori* may be a case of misdemeanor.

There is no allegation in this plea, that it did not so appear to the Court; and if there were, or, even if an absolute necessity ought to have appeared to the Court, how can a party be allowed to aver the contrary? The finding of a cause for withdrawing a juror, or taking a case from the jury, is a judicial act; the authority to do it is intrusted by law to that Court, and no other court can revise its decision. Suppose the allegation in this plea, that the case was taken from the jury without necessity, had been traversed, and the issue put to the jury; the substance of their finding must be that, in their judgment, there was no necessity. But their judgment has nothing to do with the matter. They are not the tribunal to judge of the existence of the necessity; and, therefore, their finding would be wholly immaterial, even if the party was not estopped, as he clearly is, from averring, that a judicial act was not founded on a finding of the facts necessary to support it. It seems hardly necessary to cite authorities in support of this view; but the cases of *Grignon v. Astor*, 3 How. R. 339, *Philadelphia and Trenton Railroad v. Stimpson*, 12 Pet. 458, and the cases there referred to, are directly in point to show that, where a judicial act is to be done upon proofs laid before the tribunal, and the act is done, it is to be presumed that the necessary facts were proved, and no other tribunal is at liberty to reëxamine the question. And, in the case of the *United States v. Haskell*, 4 Wash. R. 409, a prisoner being put on trial for piracy, pleaded a special plea, in which he set forth that he had been once put on trial, and the jury were discharged merely because they declared they could not agree, but did not state the true reason which induced the Court to discharge them; and the District Attorney having demurred to the plea,

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Judge Washington held that the only course was to demur; that a traverse carrying the issue to a jury, to try whether the discretion of the Court had been exercised upon facts affording a proper basis for that discretion, ought not to be taken; that all facts necessary to support the act of the Court must be presumed, and that the discharge of a jury, being an act of judicial discretion, could not form the subject of a plea in bar.

It was ingeniously argued, that the averment in this plea is, that the jury were discharged without necessity; that there was one proposition of fact,—not first admitting the fact of the discharge, and then averring it to be without necessity, but characterizing the act itself as an unnecessary discharge, and that so there was no estoppel. As has been already stated, my opinion does not rest on the ground of estoppel, even chiefly. But I think this argument is not sound. It cannot be contended that the meaning of this plea is, that the record of the discharge on its face purports that there was no necessity, and sets that out as the basis of judicial action; and if not, then the substance of this averment is, that the judicial act which the record will show, was done although there was no necessity; that is, the Court, in the exercise of its discretion, discharged the jury, and the defendant says it was without necessity. This he is clearly estopped from averring.

It remains only to notice two other objections taken by defendant's counsel,—that evidence was admitted after the juror had been examined on the *voir dire*, and that a juror cannot be challenged twice for the same cause.

What has been already stated, as to the power of the Court to interpose, and the distinction between an exercise of this power and the right of a party to challenge, is sufficient answer to this objection. But it may be added, that it is competent for a party to introduce evidence after

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examining a juror, if the evidence relates to a matter which was unknown to the juror when examined. And it does not appear, from this plea, that the evidence did not relate exclusively to a state of mind of the juror formed after he was sworn, or that the cause of challenge, if it were to be treated as a challenge, did in fact exist when the juror was sworn.

I have purposely avoided placing this opinion upon the statute law of Massachusetts, because, although the qualifications of jurors, and consequently the causes of challenge, are governed by the law of the State, it does not necessarily follow that the modes and times of making challenges are governed by the same law. I wish to be understood as not giving any opinion on this question, which is an important one, and not necessary to be decided under this plea.

But it is so clearly the general policy of the laws of the United States to assimilate the modes of proceeding in the courts of the United States to those prescribed by laws of the States where the courts are held, that it is satisfactory to find that the State has, by express enactment, (R. S. c. 95, s. 29,) conferred on parties a right of challenge, after a juror is sworn, for a cause then existing, and even known to him, if the Court think it proper to grant leave to make the challenge; and, as a guide for the exercise of the discretion of the District Court in Massachusetts, there can be no doubt of its eminent fitness. My opinion is, that the demurrer must be sustained, and the plea adjudged bad.

The District Attorney called, as a witness, John Debree, who testified that he resided at Norfolk, Virginia, and Shadrach was his slave; that he purchased him in November, 1849, of John A. Higgins, and he remained in the service of the witness until May, 1850, when he left secretly,

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and without his consent ; that he held him as a slave for life, and had not manumitted him. The District Attorney also called, as a witness, John Caphart, who testified that he was a resident of Norfolk, and had known Shadrach about sixteen years. When he first knew him he belonged to the Glen estate, and lived in Norfolk ; he knew the persons who were called his mother and father, some ten or twelve years ; his mother and father were said to belong to the same Glen estate. He had often heard Shadrach call them mother and father. He afterwards knew Shadrach as the property of Mrs. Hutchins, and he was sold by the sheriff at public vendue, at the door of the courthouse, and bought by John A. Higgins. That the witness, as a police officer, had arrested Shadrach for Higgins, and put him in jail ; that Higgins employed him in working on the stand as a licensed porter ; that he did not know of his doing any act of service for the Glens, but only heard the young Glens speak of him as their slave. Each of these witnesses described Shadrach as being between black and mulatto. This testimony was objected to by the defendant's counsel, as not competent evidence in support of the allegation, in some of the counts, that Shadrach was a person held to service and labor by John Debree, under the laws of Virginia. It was contended that, by the law of Virginia, no person is a slave except persons who were so in 1785, and the descendants of the females of them, and persons who, being slaves in other States, were introduced into Virginia, under certain regulations contained in the statute law of that State, and the descendants of the females of them ; that although there is a presumption there that negroes are held to service as slaves, that presumption did not obtain in reference to persons who had some white blood, as Shadrach is testified to have had, and that, consequently, the only mode of proving that

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Shadrach was held to service under the laws of Virginia, is to trace back his descent, through the maternal line, to some maternal ancestor who was a slave in 1785, or to some slave introduced into Virginia from another State ; that this alone would, in Virginia, show that he was held to service under the laws of that State, and that this alone would be admissible evidence of his *status* on this trial.

CURTIS, J. The first four counts in this indictment contain the allegation that Shadrach was held to service and labor by John Deeree, under the laws of the State of Virginia. To maintain these counts it is necessary to prove this allegation ; but unless some substantial distinction between this allegation and other similar allegations in indictments can be shown, it is to be proved by such evidence, and upon such principles, as would be applicable in other criminal cases. The principal distinction relied on is, that the allegation concerns the freedom of Shadrach ; and it is urged that, in Virginia, such evidence would not be admissible. Conceding this, I am not able to perceive that it decides this question ; because this is not a suit for freedom, nor can a judgment either way have any effect upon the right of either the alleged master or slave. It is said, however, that the cases cited show that, in Virginia, such evidence would not, in any case, be competent to prove that one man, not a pure negro, was the slave of another. I have examined these decisions with care, because, if I had found such to be the law of Virginia, I should certainly have hesitated to decide that a different rule should be held here ; though I am not prepared to admit that, on the trial of an indictment in this court, the rules of evidence are the same as in Virginia, even where the fact to be proved is the *status* of a person in Virginia. The general principle is certainly otherwise, rules of evi-

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dence being part of the law of the *forum*. Still, inasmuch as, in Virginia, common-law rules form the basis of their law of evidence, an application of those rules to a peculiar class of cases, of frequent occurrence there, and depending, here as well as there, so far as touches the right, upon their local law, would have great weight in my mind. And therefore, as I have said, I have looked carefully into all the cases cited by the defendant's counsel, and do not find they support the position assumed. They show satisfactorily that, in suits which directly involve the freedom of one of the parties, length of possession is not a *bar* to the claim for freedom; and that in some States, in such a suit, possession affords very feeble evidence of a legal state of slavery. But they go no further. They are all cases which directly involved the freedom of one of the parties.

The case in 1 Hen. & Munf. 133, was a suit for freedom, and a decree for the freedom of the complainants was made by the chancellor, and confirmed by the Court of Appeals. The other Virginia case, in the 1 Taylor, 165, put in issue, on the record, the freedom of the plaintiff, the defendant claiming him as her slave, and I cannot doubt that both parties were bound by the verdict on this issue. The case itself settles only that there is no presumption of slavery from color alone, in Virginia, unless the party is a negro. The 8 B. Monroe, 621, which is a very strong case, was a suit for the freedom of the complainant, as was that in 1 Martin, 184, which affirms the doctrine in 1 Taylor. The Courts, not only of Virginia, but of other slave States, seem to have treated suits for freedom as a distinct class of cases, not controlled by some of the rules which are ordinarily administered, but entitled to a kind of favor, not extended to any other legal proceeding.¹

¹ Vaughan v. Phebe, Mart. & Yerg. 5; 1 H. & M. 134.

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But I have looked in vain for cases tending to show that whenever the fact of slavery, under the law, is put in issue, in a proceeding *other than a suit involving freedom*, any rules of evidence are administered anywhere, except such as are applicable to similar facts in cases at the common law.

The absence of any such evidence affords, in my judgment, very strong reasons for the belief that no such distinction between evidence to prove legal slavery, and evidence to prove any similar fact, exists in Virginia; and this for two reasons. There is a very considerable number of penal laws in that, as well as other States, which would require indictments and actions framed upon them to allege the fact that one person was the slave of another; of course this allegation must be proved. Many cases are reported in which questions have grown out of this allegation. Now, if it were necessary, in support of such allegation, in every case where the alleged slave was not a negro, to trace back his pedigree to 1785, it is hardly possible that numerous questions of law should not have grown out of so peculiar a state of things, and found their way into the books. In the next place, the enormous inconvenience of this rule, viewed practically, is a reason for not expecting to find it. One is indicted for selling intoxicating liquor to a slave, or trading with a slave, without license from his master, or for a great variety of other offences created by statute in the slave States, as matters of local police. The fact of slavery under the law must be proved. Is it conceivable that it should be required in such cases to trace a pedigree for upwards of sixty years, or would it be enough for the master to testify that the person mentioned in the indictment was his slave? On the other hand, it is settled, by the Supreme Court of the United States, that, even in a suit for freedom, the same

rules of evidence are administered as in other cases, and there is highly respectable authority, that where the fact of slavery is to be proved, under an indictment, penal action, or other proceeding, the same presumptions are allowed as the law deems applicable to other similar facts.

The case of *Mima v. Hepburn*, 7 Cranch, 295, was a suit for freedom. Chief Justice Marshall, in delivering the opinion of the Court, says:—"However the feelings of the individual may be interested on the part of a person claiming freedom, the Court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description, which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which this Court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others, where rights may depend on facts which happened many years past."

Johnson v. Tompkins, Bald. R. 577, was a penal action for a rescue. Mr. Justice Baldwin says: "On a question of slavery or freedom, the right is to be established by the same rules of evidence as in other contests about the right to property, 7 Cranch, 295; quiet and undisturbed possession is evidence of ownership, and cannot be disturbed by any one who has not the right of property, and the burden of proof rests on the one who is not in possession."

In *Chatham v. Canfield's Executors*, 3 Hals. 52, the question was, whether the executors were bound to support a pauper, as the slave of the testator, and it is treated as a question of circumstantial evidence. In *Millar v. Drunman*, 8 Yerg. 233, where the precise point was, what would be *prima facie* evidence of slavery, in a penal action for enticing away the plaintiff's slave, it is held, that the mere fact

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of possession and claim of ownership is not sufficient to encounter the presumption arising from the usual marks of European descent; but that dark complexion, woolly head, and flat nose, with possession and claim of ownership, do afford *prima facie* evidence of the slavery and ownership charged.

These authorities compel me to come to the conclusion that, though the fact of slavery, under the law of Virginia, is to be proved, it may, in this case, be proved by such evidence as, upon the principles of the common law, is competent and sufficient.

Upon the principles of the common law, I think this evidence is competent, and, if not controlled, sufficient to establish the fact, that Shadrach was held to service by Mr. Debee under the laws of Virginia. This is a question of *status*, of his relation to another person. How is such a matter ordinarily proved? Very commonly by showing that the person was treated as standing in that relation. The question arises, whether A is the heir of B. This is a complex question, embracing both law and fact. There must have been a lawful marriage and cohabitation, and B the issue of that marriage. Yet it is competent and sufficient evidence, that B treated A as his son. *Berkley Peerage Case*, 4 Campb. 416. This is also a question of property under the law of Virginia; and, by the common law, possession is evidence of property, unless the circumstances accompanying the possession rebut the inference of property.

It is argued, however, that the law requires the best evidence. To appreciate this argument, it is necessary to look a little further, and see what the defendant's counsel consider is the best evidence. Suppose the government were to attempt to trace the pedigree of this man back to 1785. The first step would be to show, by persons who

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knew them, that some person spoke of and treated him as her son, and that he spoke of and treated her as his mother, or that he was reputed among those nearly connected to be her son, and thus go back to some maternal ancestor in 1785; and, having arrived at that point, the next step would be to prove that that ancestor was a slave; and I suppose it would hardly be doubted that this last could be proved, by showing that she had marks of African descent, and was bought and sold as a slave, and held as such all her lifetime. But, in that case, we should not have evidence of any different nature, or any which the law considers better. Indeed, if a pedigree were to be proved, even hearsay evidence would be admissible; so that we should thus have evidence of the lowest kind, which ordinarily is not competent.

The case of master and apprentice was mentioned; but here a deed is necessary to constitute this relation; and the deed is a higher kind of evidence, and must be produced, or its loss shown and its contents proved. As to the case of a public officer, which has been alluded to as illustrating the argument, it is well settled, that it is not necessary to produce his commission. It is enough, *prima facie*, that he acted as an officer. 1 Greenl. on Evid. s. 83, 92.

The rule which requires the best evidence to be produced, does not seem to me to have any application to this case. The real point of the objection is, not that there is better evidence, but that the government offer evidence that this person was bought and sold and treated as a slave, instead of tracing back his pedigree to some one in 1785, and then offering evidence that that person was bought and sold and treated as a slave. But if the evidence would be competent, in the last case, to prove, *prima facie*, a state of slavery of the ancestor in 1785, why is it

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not also competent, in the first case, to prove a state of slavery of Shadrach in 1849? The ancestor in 1785 must be shown to be legally a slave; and if such evidence would be admissible to prove that, I am wholly at a loss to perceive why it is not equally admissible in this case. Upon the authority of the cases cited from 7 Cranch, reviewed and confirmed in *Davis et al. v. Wood*, 1 Wheat. 6, and upon the decision of Mr. Justice Baldwin, before referred to, and the principles of the common law of evidence, I think this evidence is admissible, and, if not controlled, sufficient to establish that Shadrach was held to service under the laws of Virginia when he escaped from that State. Certainly, it is merely *prima facie*, and liable to be controlled by other evidence, tending to show that he was not a slave.

While one of the counsel for the defendant was addressing the jury, he stated the proposition that, this being a criminal case, the jury were rightfully the judges of the law, as well as the fact; and if any of them conscientiously believed the Act of 1850, commonly called the "Fugitive Slave Act," to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the Court might give them; and he was about to address the jury in support of this assertion, when he was stopped by the Court, and informed that he could not be permitted to argue this proposition to the jury; that the Court would hear him, and if they should be of the opinion that the proposition was true, the jury would be so informed by the Court; and the counsel then addressed the Court in support of the position. The opinion of the Court thereon was delivered by

CURTIS, J. The Constitution of the United States, art. 3, s. 2, provides, that "the trial of all crimes, except in

cases of impeachment, shall be by jury." The counsel for the defendant maintains that, in every such trial of a crime, the jury are the judges of the law, as well as of the fact; that they have not only the power, but the right, to decide the law; that, though the Court may give its opinion to the jury respecting any matter of law involved in the issue, yet the jury may and should allow to that opinion only just such weight as they may think it deserves; that, if it does not agree with their own convictions, they are bound to disregard it, the responsibility of deciding rightly all questions, both of law and fact, involved in the general issue, resting upon them, under the sanction of their oaths.

This is an important question, and it has been pressed upon the attention of the Court, with great earnestness and much power of language, by one of the defendant's counsel. I have no right to avoid a decision of it. I certainly should have preferred to have a question of so much importance,—respecting which so deep an interest is felt, such strong convictions entertained, and, I may add, respecting which there has not been an entire uniformity of opinion,—go to the highest tribunal for a decision; but it is not practicable in this case. I proceed, therefore, to state the opinion which I hold concerning it. The true question is, what is meant by that clause of the Constitution, "the trial of crimes shall be by jury."

Assuming, what no one will controvert, that the tribunals for the trial of crimes were intended to be constituted, as all common-law tribunals in which trial by jury was practised were constituted, having one or more judges, who were to preside at the trials, and form one part of the tribunal, and a jury of twelve men, who were to form the other part, and that one or the other must authoritatively and finally determine the law, was it the meaning of the Consti-

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tution that to the jury, and not to the judges, this power should be intrusted? There is no sounder rule of interpretation than that which requires us to look at the whole of an instrument, before we determine a question of construction of any particular part; and this rule is of the utmost importance, when applied to an instrument, the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments. It is needful, therefore, before determining this question upon a critical examination of the particular phrase in question, to examine some other provisions of the Constitution, which are parts of the same great whole to which the clause in question belongs. We find, in Article VI., "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land." Nothing can be clearer than the intention to have the Constitution, laws, and treaties of the United States in equal force throughout every part of the territory of the United States, alike in all places, at all times. To secure this necessary end, a judicial department was created, whose officers were to be appointed by the President, paid from the national treasury, responsible, through the House of Representatives, to the Senate of the United States, and so organized, by means of the Supreme Court, established by the Constitution, and such inferior courts as Congress might establish, as to secure a uniform and consistent interpretation of the laws, and an unvarying enforcement of them, according to their just meaning and effect. That whatever was done by the government of the United States should be by standing laws, operating equally in all parts of the country, binding on all citizens alike, and binding to the same extent, and

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with precisely the same effect, on all, was undoubtedly intended by the Constitution; and any construction of a particular clause of the Constitution, which would tend to defeat this essential end, is, to say the least, open to very serious objection.

It seems to me, that what is contended for by the defendant's counsel would have something more than a mere tendency of this kind. *The Federalist*, in discussing the judicial power, remarks: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."¹ But what is here insisted on is, that every jury, impanelled in every court of the United States, is the rightful and final judge of the existence, construction, and effect of every law which may be material in the trial of any criminal case; and not only this, but that every such jury may, and, if it does its duty, must, decide finally, and without any possibility of a revision, upon the constitutional power of Congress to enact every statute of the United States which on such a trial may be brought in question. So that we should have, not thirteen, but a vast number of courts, having final jurisdiction over the same causes, arising under the same laws; and these courts chosen by lot among us, and selected by the marshal elsewhere, out of the body of the people, with no reference to their qualifications to decide questions of law; not allowed to give any reasons for their decisions, as will be presently shown, not sworn to decide the law, nor even to support the Constitution of the United States; and yet possessing complete authority to determine that an act, passed by the legislative department, with all the forms of legislation, is

¹ *Federalist*, No. 80.

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inoperative and invalid. The practical consequences of such a state of things are too serious to be lightly encountered; and, in my opinion, the Constitution did not design to create or recognize any such power by the clause in question.

Some light, as to its meaning, may be derived from other provisions in the same instrument. The sixth Article, after declaring that the Constitution, laws, and treaties of the United States shall be the supreme law of the land, proceeds, "and the *judges*, in every State, shall be bound thereby."

But was it not intended, that the Constitution, laws, and treaties of the United States should be the supreme law in *criminal* as well as in *civil* cases? If a State law should make it penal for an officer of the United States to do what an act of Congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases, juries finally and rightfully determine the law, and the Constitution so means when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter?

It was evidently the intention of the Constitution, that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States, but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the Constitution confides the power of expounding that instrument; and not only construing, but holding invalid, any law which may come in question on a criminal trial.

This may all be true; but strong reasons should be shown before it can be admitted.

I have considered with much care the reasons assigned and the authorities cited by the defendant's counsel, and have examined others which he did not cite; and the result is, that his position, both upon authority and reason, is not tenable. I will first state what is my own view of the rightful powers and duties of the jury and the Court in criminal cases, and then see how far they are in conformity with the authorities, and consistent with what is admitted by all to be settled law.

In my opinion, then, it is the duty of the Court to decide every question of law which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they are to apply to the facts, as they find them, and thus, passing both on the law and the fact, they, from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the Constitution, which conflicts with it. It was suggested at the bar, that Chief Justice Vaughan's opinion, in *Bushnell's Case*, 5 State Trials, 99, was in support of the right of juries to determine the law in a criminal case; but it will be found that he confines himself to a narrow, though, for the case, a conclusive line of argument, that the general issue embracing fact as well as law, it can never be proved that the

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jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they cannot be shown to be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the Court in matter of law.

Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made, in England, near the close of the last century, when the law of libel was under discussion in the courts and in Parliament, it cannot be doubted that, if any decision, having the least weight, could have been produced in support of the general proposition, that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench, in *Rex v. The Dean of St. Asaph*, 3 T. R. 428, and the answers of the twelve judges to the questions propounded by the House of Lords, assume, as a necessary postulate, what Lord Mansfield so clearly declares in terms, that, by the law of England, juries cannot rightfully decide a question of law. Passing over what was asserted by ardent partisans and eloquent counsel, it will be found that the great contest concerning what is known in history as Mr. Fox's Libel Bill, was carried on upon quite a different ground by its leading friends; a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law; and asserts that it is so mixed with the fact that, under the general issue, it is for the jury to find it as a fact.¹ Such I understand to be the effect of that famous declaratory law. (St. 32 Geo. III. c. 60.) The defendant's counsel argued that this law had declared that, on

¹ Annual Register, vol. 34, p. 170. 29 Par. His. Debates in the Lords, and particularly Lord Camden's Speeches.

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trials for libel, the jury should be allowed to pass on law and fact, *as in other criminal cases*. But this is erroneous. Language somewhat like this occurs in the statute, but in quite a different connection, and, as I think, with just the opposite meaning.

“The court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his *opinion and directions* to the jury, on the matter in issue between the King and the defendant, *in like manner as in other criminal cases*.”

This seems to me to carry the clearest implication that, in this and all other criminal cases, the jury may be *directed* by the judge; and that, while the object of the statute was to declare that there was other matter of fact besides publication and the innuendoes to be decided by the jury, it was not intended to interfere with the proper province of the judge, to decide all matters of law. That this is the received opinion in England, and that the general rule, declared in *Rex v. Dean of St. Asaph*, that juries cannot rightfully decide the law in criminal cases, is still the law in England, may be seen by reference to the opinions of Parke, B., in *Parmiter v. Copeland*, 6 M. & W. 165; and of Best, C. J., in *Levi v. Milne*, 4 Bing. R. 195.

I conclude, then, that when the Constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as civil cases, the Court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the Constitution when it adopts a trial by jury.

It is argued, however, that, in passing the Sedition Law, St. 1798, c. 74, s. 3, Congress expressly provided, that the jury should have the right to determine the law and the fact, under the direction of the Court, as in other cases,

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and that this shows that in other cases juries may decide the law, contrary to the direction of the Court.

I draw from this the opposite inference; for where was the necessity of this provision if, by force of the Constitution, juries, as such, have both the power and the right to determine all questions in criminal cases; and why are they to be directed by the Court? In *Montgomery v. The State*, 11 Ohio R. 427, the Supreme Court of Ohio, in discussing the question, whether juries are judges of the law, refer to an article in the Bill of Rights of that State, which is in the same words as this section of the Sedition Act, and the opinion of the Court then proceeds: "It would seem from this that the framers of our Bill of Rights did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the direction of Courts. Their right to judge of the law is a right to be exercised only under the direction of the Court; and if they go aside from that direction, and determine the law incorrectly, they depart from their duty and commit a public wrong; and this in criminal as well as civil cases."

There is, however, another act of Congress which bears directly on this question. The Act of the 29th of April, 1802, in section 6, after enacting that, in case of a division of opinion between the judges of the Circuit Court, on any question, such question may be certified to the Supreme Court, proceeds, "and shall by the said Court be *finally decided*. And the decision of the Supreme Court, and their order in the premises, shall be remitted to the Circuit Court, and be there entered of record, and have effect according to the nature of such judgment and order." The residue of this section proves that criminal as well as civil cases are embraced in it; and under it, many questions arising in criminal cases have been certified to and decided by the Supreme Court, and persons have been executed by reason of such decisions.

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Now, can it be that, after a question arising in a criminal trial has been certified to the Supreme Court, and there, in the language of this act, finally decided, and their order remitted here and entered of record, that when the trial comes on, the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the judges had divided in opinion upon the question of the constitutionality of the Act of 1850, and that, after a final decision thereon by the Supreme Court and the receipt of its mandate here, the trial should come on before a jury, does the Constitution of the United States, which established that Supreme Court, intend that a jury may, as matter of right, revise and reverse that decision? And, if not, what becomes of this supposed right? Are the decisions of the Supreme Court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and if it were, how is it to be determined whether the Supreme Court has or has not, in some former case, in effect, settled a particular question of law? In my judgment, this act of Congress is in accordance with the Constitution, and designed to effect one of its important and even necessary objects—a uniform exposition and interpretation of the law of the United States—by providing means for a final decision of any question of law; final as respects every tribunal, and every part of any tribunal in the country; and if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove, that no such right as is claimed does or can exist.

An examination of the judicial decisions of courts of the United States since the organization of the government will show, as I think, that the weight of authority is against the position taken by the defendant's counsel.

The earliest case is 3 Dall. R. 4. Chief Justice Jay is

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there reported to have said to a jury, that on questions of fact it is the province of the jury, on questions of law it is the province of the Court to decide. And, in the very next sentence, he informs them, they have the *right* to take upon themselves to determine the law as well as the fact. And he concludes with the statement, that both law and fact are lawfully within their power of decision.

I cannot help feeling much doubt respecting the accuracy of this report; not only because the different parts of the charge are in conflict with each other, but because I can scarcely believe that the Chief Justice held the opinion that, in civil cases, and this was a civil case, the jury had the right to decide the law. Indeed the whole case is an anomaly. It purports to be a trial by jury, in the Supreme Court of the United States, of certain issues out of Chancery. And the Chief Justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole Court were agreed. If it be correctly reported, I can only say, it is not in accordance with the views of any other Court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the Supreme Court for many years.

In the *United States v. Wilson et al.*, Baldw. R. 78, which was an indictment for robbing the mail, the Court instructed the jury explicitly, that they had a right to judge of the law, and decide contrary to the opinion of the Court; but in the *United States v. Shine*, Baldw. R. 510, which was an indictment for passing a counterfeit note of the bank of the United States, the defendant's counsel, having insisted to the jury that the bank was unconstitutional, the Court, with equal explicitness, told the jury they had no right to judge of the constitutionality of an Act of Congress, and, in the strongest terms, declared, that

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the exercise of such a power would leave us without a constitution or laws. With great respect for the very able and learned judge, I cannot but think that the criticism of Judge Conkling (Conkl. Pr. 426) is just, when he confesses his inability to discover any difference in principle between these two cases, with respect to the rights of juries to decide the law in criminal cases; and if so, the later opinion of that Court was entirely adverse to the right claimed.

It has been suggested, that the articles of impeachment of Judge Chase, and the line of defence adopted by his counsel, have a tendency to support the views of the defendant's counsel. The first article of impeachment does speak of the undoubted right of juries to judge of the law in criminal cases; but I can allow no other force to this, than that it proves that a majority of the then House of Representatives thought it fit to make that allegation in that proceeding. And, although the counsel for the accused rested the defence of their client against this charge mainly on a denial of the facts, yet, in the arguments of Mr. Martin and Mr. Harper, will be found a statement of their opinions on this question, marked with that ability for which both were so highly distinguished, and leaving no ground for the assertion, that the right in question was conceded by them.¹

In *United States v. Battiste*, 2 Sumner, 240, Mr. Justice Story pronounced an opinion on this question, during the trial of a capital indictment. He denied that this right existed, and gave reasons for the denial of exceeding weight and force. If we look to the decisions of the courts of the States, I think we shall find their weight in the same scale.

¹ Chase's Trial, p. 182.

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The earliest case is *People v. Casswell*, 3 Johns. Cas. 337. The question was, as to the right of the jury to pass on and decide the intent, under an indictment for a libel. The Court were equally divided. As has already been suggested, this is by no means the question raised here; and that by the law of the State of New York, at this day, the jury are not judges of the law, in the sense now contended for, I infer, from the opinion of Judge Barculo, in *People v. Price*, 1 Barb. S. C. R. 566; for, in the trial of an indictment for murder, he told the jury that it was their duty to receive the law from the Court, and conform their decision to its instructions; and under this ruling the prisoner was convicted and executed.

This question has been very carefully considered, and elaborate and extremely able opinions upon it delivered by the highest courts in Indiana, New Hampshire, and Massachusetts.¹ The reasoning of these opinions, so far as it is applicable to the question before me, has my entire assent. The question is not necessarily the same in the courts of the several States, and of the United States, though many of the elements which enter into it are alike in all courts of common law, not bound by some statute or constitutional provision.

It remains for me to notice briefly some of the arguments which are relied on by the defendant's counsel, in support of his position. It is said that, in rendering a general verdict of guilty, or not guilty, the jury have the power to pass, and do in fact pass, on every thing which enters into the crime. This is true. But it is just as true of a gene-

¹ *Townsend v. The State*, 2 Blackf. (Ind.) R. 152; *Pierce v. The State*, 13 N. H. R. 536; *Commonwealth v. Porter*, 10 Met. R. 263.

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ral verdict in trover or trespass; and yet I suppose the right of the jury to decide the law in those cases, is not claimed. The jury have the power to go contrary to the law as decided by the Court; but that the power is not the right, is plain, when we consider that they have also the like power to go contrary to the evidence, which they are sworn not to do.

It is supposed that the old common-law form of the oath of jurors, in criminal cases, indicates that they are not bound to take the law from the Court. It does not so strike my mind. They are sworn to decide according to the evidence. This must mean that they are to decide the facts according to the evidence. But if they may also decide the law, they are wholly unsworn as to that, and act under no obligation of an oath at all in making such decision. A passage in Littleton's Tenures, (lib. 3, s. 368,) and the Statute Westminster, 2d C. 30, (13 Ed. 1,) and the Commentary of Coke thereon, relating to an assize, (2 Inst. 425,) have been referred to, as throwing light on this inquiry; but it seems to me enough to say, that the assize was not a jury; that an assize was not a criminal case, but an action between party and party, and that if the statute intended to confer on the assize the right as well as the power to decide the law, it was a strange provision which subjected them to punishment if they decided the law wrong; for it would seem that what was right or what was wrong must be determined by the tribunal having the rightful power to determine it, which is supposed to be the assize itself.¹

That it has been a familiar saying among the profession

¹ For some able criticism on this statute, see the opinion of Gilchrist, J., in 13 N. H. R. 542; Worthington on Juries, 72-94.

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in this country, and an opinion entertained by highly respectable judges, that the jury are judges of the law as well as of the facts, I have no doubt. In some sense I believe it to be true, for they are the sole judges of the application of the law to the particular case. In this sense, theirs is the duty to pass on the law—a most important, and often difficult duty, which, when discharged, makes the difference between a general and a special verdict, which, although they may return, they are not bound to return. They are a coördinate branch of the tribunal, having their appropriate powers and rights and duties, with the proper discharge and exercise of which no Court can, without usurpation, interfere; but it is not their province to decide any question of law in criminal, any more than civil cases; and if they should intentionally fail to apply to the case the law given to them by the Court, it would be, in my opinion, as much a violation of duty as if they were knowingly to return a verdict contrary to the evidence.

A strong appeal has been made to the Court, by one of the defendant's counsel, upon the ground that the exercise of this power by juries is important to the preservation of the rights and liberties of the citizen. If I thought so, I should pause long before I denied its existence. But a good deal of reflection has convinced me that the argument drawn from this quarter is really the other way. As long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a Court of Impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But on the other hand, I do consider that this power and corresponding duty of the Court, authoritatively to declare the

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law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times, or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause, when a law, unpopular in some locality, is to be enforced there, then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne.

I have entered thus at large into this important question, in the course of a jury trial, with unaffected reluctance. Having been directly and strongly appealed to, and finding that no judge of any court of the United States had, in any published opinion, examined it upon such grounds, that I could feel I had a right to repose on his decision without more, I knew not how to avoid the duty which was thus thrown upon me. My firm conviction is, that under the Constitution of the United States, juries, in criminal trials, have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the Court.

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A new trial will not be granted because the verdict is against the evidence, unless the Court can clearly see that the jury must have unconsciously fallen into some mistake, or been actuated by some improper motive. In revenue causes, it is particularly important that the verdict should be the result of a full and careful investigation of the questions of fact.

THIS was an action of assumpsit, brought by the plaintiffs, who are merchants in the city of Boston, against the

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defendant, the Collector of that port, to recover back a sum of money paid to him, under protest, for duties on certain merchandise imported by the plaintiffs. It appeared, at the trial, that in August, 1849, there arrived in Boston, by two ships, two parcels of merchandise, consigned to the plaintiffs, and invoiced as being *blankets*; that the defendant refused to allow them to be entered and passed as blankets, paying a duty of 20 per cent., but exacted a duty of 30 per cent. ad valorem, as being, not blankets, but articles not enumerated, of which wool was the component material,¹ of chief value. The trial was before Mr. Justice Woodbury, at the last May term of the Court, who instructed the jury that the burden of proof was on the Collector, to show that the article was not truly described in the invoice, and that the question was, whether these articles were such as, at the time of the passage of the Act of 1846, were known in commerce as blankets. The jury found a verdict for the defendant. The plaintiff moved for a new trial, because the verdict was against the evidence, and also for newly discovered evidence.

The questions were argued before Mr. Justice Woodbury, at the last term, but had not been decided by him at the time of his decease, and at the present term were again argued, before Mr. Justice Curtis, by the *District Attorney*, and *Sanger*, for the United States, and by *Woodbury*, and *A. W. Griswold*, for the plaintiffs.

The opinion of the Court was delivered by

CURTIS, J. I hold it to be my duty not to interfere with the verdict of a jury, as being against the evidence, unless I can clearly see that the jury must have unconsciously

¹ Stat. 1846, Sched. A and D (9 Stat. at Large, 44, 46.)

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fallen into some mistake, or been actuated by some improper motive in rendering the verdict.¹ On examining the evidence introduced by the defendant, on whom was the burden of proof, to show that these articles were not known in commerce as blankets, at the time of the passage of the Tariff Act of 1846, I find he called seven witnesses. The first was C. J. F. Allen, an appraiser in the custom-house, who testified that he, and Mr. Bradley, another appraiser, examined these articles, and concluded they were not blankets in the meaning and intent of the law; that he has always considered the stripe essential to a blanket, but he should call the plaintiffs' green sample a horse-blanket, though it has no stripe. It must be noted that this is rather evidence of the witness's own views of nomenclature, and of the interpretation of the law, than direct testimony that the articles were not generally known in commerce as blankets. The testimony of Charles Bradley, the other appraiser, is, that they were not known, prior to 1846, as blankets. Lincoln, another appraiser, testifies in the same way, but he admits that, as an appraiser, he had passed as blankets an invoice of these articles, of somewhat higher cost, and same general style and fabric, and which were imported by the plaintiffs under the same order, arriving a little earlier, by another vessel. Chase, another witness, who had been, until the last three years, an importer, and since a manufacturer, testified they were not known as blankets, but admitted that he had had difficulty with the plaintiffs, and two bills were produced, made out by one of his clerks, who, he said, was a competent man of business, showing sales of similar articles by his firm, under

¹ *Alsop v. Com. Ins. Co.* 1 Sumn. 472; *Fearing et al. v. De Wolf et al.* 3 W. & M. 185; *Hepburn v. Dubois*, 12 Peters, R. 376.

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the name of blankets. Simpson, a manufacturer, testified they were known as coatings, and not as blankets, though if they had a stripe they might be called blankets. Thomas Tarbell, who was forty-five years an importer in Boston, but had retired from business, testified that these articles were generally known as blankets, in commerce, in and long before 1846, and that the stripe was not material. Lewis Mills, who had been a merchant, and was connected indirectly with manufacturing business, testified he should not have supposed the plaintiffs' samples were blankets; he would call them blanket coating, but that the absence of the stripe made no difference.

Bearing in mind the nature of the fact to be proved, namely, that these articles were not generally known in commerce as blankets, and consequently the number of witnesses who must have knowledge of this fact, if it be true, this strikes me as a very weak case. Out of these seven witnesses, one, Mr. Tarbell, is directly and pointedly against the defendant; two, Lincoln and Chase, have practically treated such articles, or had them treated, by an agent, as blankets, and two, Allen and Simpson, rest their evidence on the absence of the stripe, which Tarbell, and Mills, and eleven witnesses for the plaintiffs, swear is immaterial. On the other side, the plaintiffs produce six witnesses, resident here, and five, by depositions, from New York, importers, and dealers in, and manufacturers of clothing, who swear that prior to 1846, and ever since, articles, in all respects like these, have been generally known in commerce as blankets, and they state the reasons why the stripe, which was formerly borne on blankets, has been generally left off; and one of them testifies that in 1846 he paid about \$1,000, under protest, for duties on articles like the plaintiffs', and in 1848 it was returned to him by the government.

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Now, although it is true that the defendant introduced some evidence fit to be weighed by the jury, it is to my mind clear that the whole evidence, viewed together, not only preponderated in favor of the plaintiffs, but so decidedly and strongly preponderated that it seems to me scarcely possible that men of average intelligence, who understood what the question was, could have hesitated to come to the conclusion that the defendant had not sustained the burden of proof which rested on him.

Whether there is not another question in the case, not submitted to the jury specifically, namely, whether the absence of the stripe is not sufficient to render these goods coatings, if by leaving off the stripe they are made such in substance, cannot now be determined.

I am sensible of the difficulty under which I labor in this case, from not having been present at the trial, for I know very well that evidence which is heard from a witness who is seen, may properly produce an effect on the mind quite different from a report of the same evidence. But the law has made it my duty to decide this motion upon such a report, and one party to this case is as likely to gain or lose by it as the other. It was fairly suggested, at the bar, that the witnesses are to be weighed, and not numbered, and that several of the plaintiff's witnesses are importers, and one of them a foreigner; but it is a fair answer, that though importers have one interest, manufacturers have another, and that every witness called by the defendant, who did not testify against him, was either a custom-house officer, or connected with manufactures in the United States. It was also argued that great weight should be allowed to the fact that the jury had the samples of the plaintiffs' merchandise, and also of other cloths and blankets, before them, and so had means of forming an opinion not known to the Court. But the question, as

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submitted to them, was of such a character that the exhibition of these samples could conduct the jury but a short distance towards the result. It was not for the jury to find what they would deem a fit name for these articles, but what name they generally bore in commerce; and whatever may have been the appearance of the samples, this could be known to the jury only by the testimony of commercial men. Indeed, I am inclined to think that this exhibition of samples was one cause why the jury was misled; for, unless they were carefully cautioned, they would be very likely to compare the samples with their own ideas of what a blanket should be, and thus go aside from the true question..

My judgment has also been somewhat affected by the conviction, that newly-discovered evidence, of considerable importance, may be laid before the jury on another trial. I do not think this alone would be sufficient cause to set aside the verdict, because the evidence is cumulative, and because I am not satisfied that due diligence was used to discover and produce this evidence at the trial; but when the Court sees reason to believe that the jury have fallen into a mistake, it may well affect the exercise of its discretion, and cause it to act with less hesitation, if it also sees that, on another trial, the subject will be investigated under fuller and better light, and so justice will be more certainly done.¹

I consider that the nature of this case is justly entitled to some consideration, on this motion for a new trial. Judicial decisions of such questions, under the revenue laws, afford guides both to the government and the importer in very numerous cases; and it is of great public

¹ *Norris v. Freeman*, 3 Wils. R. 38; *Jackson v. Sternberg*, 1 Caines, R. 163.

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importance that they should rest on secure foundations, which are felt to be such as ought to be generally satisfactory ; otherwise they will not be acquiesced in, and litigation will be multiplied, with the chance, at least, that different results may be arrived at in different parts of the country, and thus a system of duties on imports, designed to be uniform throughout the United States, will be in danger of becoming unequal, and consequently unjust.

In trials of this kind, the jury really do what is ordinarily done by the Court ; for they put an interpretation on the language of a statute. This is inevitably necessary ; but it makes the meaning of the law dependent on the verdicts of juries, which can have no legal operation, except in the cases in which they are rendered, instead of being settled by the judicial decision of the highest Court, which would be binding in other future cases. This is an evil, and it is highly important that it should not be magnified by suffering verdicts in such cases to stand, when the Court sees sufficient reason to believe that the investigation was incomplete, and that the jury must have been under some mistake respecting the true question on which they were required to pass.

The result is that the verdict is to be set aside, and a new trial granted.

HARVEY JORDAN, APPELLANT, *vs.* ROBERT WILLIAMS.

SAME *vs.* SAMUEL GATES.

It is the duty of the master to interpose and quell an affray between the mate and the crew, and to use such means and such a degree of force as a competent master, of ordinary coolness, judging of the emergency upon the instant, might fairly deem necessary.

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Under the Act of Congress of July 20, 1840, s. 16, the phrase, "to lay their *complaints* before the consul," applies only to such causes of complaint as are specified in the act, viz., that the mariner is detained contrary to his agreement, or that the vessel is unseaworthy, &c., &c., and not to affrays or quarrels between the officers and crew.

The liberty given to the crew by said act, to lay their complaints before the consul, is to be exercised under the fair and reasonable discretion of the master of the vessel, as to the time and mode of landing; and a refusal of duty on the part of the crew, because such permission is not given, would be justifiable only when such refusal is necessary to prevent the loss of the right.

Since the passage of the Act of July 20, 1840, when the master of a vessel, in a foreign port, lays a complaint against any of his crew fully and fairly before the consul, and the complaint is such that a competent master may fairly believe it to be within the consul's jurisdiction, and the consul, upon examination, finds it expedient or necessary to make use of the local authorities to keep the men safely, the master is not responsible for their imprisonment as for a *tort*, the consul being answerable to the injured party for any malversation or abuse of power.

The detention by the master of the clothes of men imprisoned by the local authorities upon request of the consul, by reason of information given him by the master, while still belonging to the vessel, and also after their discharge therefrom, is a breach of duty on the part of the master.

THESE were libels filed in the District Court by Williams and Gates, two of the crew of the bark Gibraltar, against Jordan, the master, complaining of an assault on board the bark, an imprisonment in the jail at Matanzas, and a conversion of the clothing of each libellant. The libellants testified for each other, and produced no other evidence. The material facts appear in the opinion of the Court.

The case was argued by *R. H. Dana*, for the appellant, and *J. H. Prince*, for the appellees.

CURTIS, J. The material facts, stated in the libels and testified to by the libellants themselves, are that, on the morning of the 11th of April, while the bark was lying in the harbor of Matanzas, the mate came forward at

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daylight and called all hands. No answer was made to this call. The call was repeated, in what one of the libellants characterizes as a loud, boisterous, and profane manner. Thereupon, Gates made answer, "You need not kick up such a noise, for you were answered the second time." Some insulting words then passed between the mate and Gates; Williams interposed in the quarrel, the mate struck Williams with his fist, the blow was instantly returned, Williams and the mate clenched each other; the master came forward and seized Williams by the hair of the head and drew him down to the deck, or, as Williams says, toward the deck, and, while he was in that position, the mate kicked Williams in the face. Williams cried out, that the mate was kicking him; and Gates approached and said, "Knock off such work as this!" The master let go his hold of Williams, and struck Gates twice in the face. The contest then ceased; the master ordered the men to go to their work, and both officers went aft. The answers of the master state, that he knew nothing of the affair, being below, until two of the crew came aft, and called to him that the men were trying to kill the mate; that he ran on deck, and found five of the men, who constituted, at the time, the whole crew, except two men and a boy, attacking the mate; that he rescued the mate from them, and in so doing received a blow from Gates, and part of his clothing was torn off his back. He denies that he seized Williams in the manner stated, or that, to his knowledge, the mate either struck or kicked him; and he sets forth in his answer that, by reason of the lapse of upwards of a year between the termination of the voyage and the filing of these libels, the mate, and the two men who were faithful to their duty, have gone beyond his reach, so that he cannot produce either of them as witnesses.

I do not deem it necessary, in this part of the case, to

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weigh very nicely the evidence of the libellants and the answers of the master, so far as they differ; because it does not seem to me that, if all which the libellants testify to were true, damages for an assault by the master ought to be awarded to either of these men. So far as appears, the first knowledge which the master had of this contest was when he saw his first officer and one of the crew grappling with each other on the forecastle, four others of the crew being close at hand, even if they were not taking part in the affray. These men constituted, at that time, the whole crew, except two men and a boy; and one of these two men is said to have been a deserter from a British ship of war, who kept himself concealed in the daytime in the hold. There was no second mate on board, the first mate having been discharged at Havana, as appears by the shipping articles, on the 10th of the preceding March; and though Rooker, the second mate, was, on the same day, promoted to be first mate, no second mate was shipped; and it was not until the 17th of April that Reed, one of the crew, was appointed second mate. So that, when the master first saw this affray between his only officer and one or more of the crew, he had reason to believe that one man and a boy were the only assistants on whom he could rely. That it was not only his right but his duty to interpose, and put an end to the contest immediately, there can be no doubt; and it is equally clear, that he was justified in using such means as a competent master, of ordinary coolness, judging upon the instant of the facts before him, might fairly deem necessary. It should be added that, from the nature of such an interposition, if force be necessary, the person thus lawfully using it, to quell a fight between an officer and one or more of the crew, cannot reasonably be expected to measure his exertions by so nice a standard as would be necessary if

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there were time for reflection, and opportunity to proportion the force exactly to meet the demand for it. Tested by these principles, I am not satisfied that the force used by the master was excessive. Interposing, as he did, to rescue the mate, it is, to my mind, highly improbable that he struck Gates, unless Gates was assisting Williams in attacking the mate; for it appears there had been no previous difficulty between them, and it was not an occasion when the master would have been likely voluntarily to begin a new quarrel. He used no weapon. He did not manifest any passion; and as soon as the mate was released he went aft, telling the men to go to their work. This does not seem to me to be a fit case in which to award damages against the master, for an assault, in favor of these libellants, who, according to their own showing, were both originally in the wrong. Not to answer when an order was given and heard, and this order is admitted to have been heard, was a breach of discipline which might well excite the mate, and cause him to repeat the order with violence of manner, which they who had thus provoked it had scarcely a right to complain of, and still less a right to make an insulting reply,—an insult, perhaps the more readily given, and more deeply resented, because the mate had been very recently promoted to that office, from the post of second officer, in which, for many purposes, he was scarcely more than one of the crew. It is true, the assault by the mate, if he struck the first blow, was unjustifiable; but for this the master, who denies all knowledge of it, and who is not proved to have known it, cannot be held responsible; his duty being to put an end to the affray, whoever began it. For this cause of action, therefore, I can award no damages.

The second ground of complaint is, that the master caused the libellants to be imprisoned on shore, in the

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prison of the local authorities at Matanzas. This is attended with much more difficulty, and presents some questions of general importance, which, so far as I have been able to learn, are now for the first time raised. The material facts sworn to by the libellants, so far as they agree in their statements, are these: that, very soon after the termination of the affray above mentioned, and while the libellants and three others of the crew were engaged in removing the main hatch, the mate said to them, with an insulting address, "I will knock your brains out with a handspike." Williams then said to the master, "Captain Jordan, do you hear that?" And he replied, with an oath, "I do hear it." Williams then said to the master, "I will do no more duty on board this ship until I see the consul." Gates and the other three men said the same; and all five left their work and went forward into the forecabin. The mate came to the forecabin door, and said to Williams, "Williams, are you going to turn to?" The reply was, "No, not until I have seen the consul." The mate told him he was a fool, and he had better think no more about it. The master then came forward, and asked each man if he was going to turn to. Each said no, until he should see the consul. The master replied, with an oath, that they should go in the ship, and that they would wish themselves in hell before the voyage was up. He soon after went on shore, returned with two boats and armed men, who carried the men on shore and took them to prison. On the next day, or the next day but one, the consul came to the prison; they informed him of what had taken place, and he said he would see into it. In a few days he returned, the master being with him, and asked the men if they did not think they had better settle it, and go aboard of the ship again, and he repeated the question to each man. All but one replied, that they were afraid of their

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lives, after the threats that were made; and that one said he would go, if the consul would give him a paper showing what had happened on board. This the consul refused. A few days afterwards, the master came again to the jail, asked if they were not tired of staying there; and said he had paid three months' board, and there might be enough for another month. He went away; and, on the 8th of May, the consul took them out of jail and sent them to the United States. This is the account given by the libellants themselves. In some material points it is directly met by the answer, and is not consistent with the certificate of the consul, which has been read as evidence by agreement, as a substitute for the consul's deposition, who, it is stated, has ceased to hold that office, and could not be found by the respondent. I shall hereafter advert to some of these discrepancies; but, before doing so, I must inquire whether the men were justified in their refusal to do any more duty on board until they could see the consul. This right is claimed under the 16th clause of the Act of July 20th, 1840, which is in these words: "The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith, stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon, it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed thereon as the act directs." This does not, in terms, give to the crew the right to refuse to do duty until they can see the con-

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sul. It may fairly be implied, that they are not bound to do such duty as would prevent the exercise of the right to see him. They cannot be lawfully required to get under weigh to go to sea, and thus be deprived of the right to lay before him their complaint of the unseaworthy condition of the vessel; they cannot properly be kept at work, and thus prevented from landing to lay their complaint before him, unless some sufficient and valid objection exists against their landing. But it by no means follows that they have the right, at any moment, to refuse to do any duty whatever till they have seen him. The master is to allow them the fullest liberty to lay their complaints before the consul; but the exercise of the fullest liberty to do so, when interpreted reasonably, is consistent with the master's being allowed fairly to exercise some discretion as to the time and mode of landing, and as to the prosecution of the work of the ship. Certainly, the refusal of the crew to obey the orders of the master is not the first step to be taken, on the instant, when this right to see the consul is claimed. Such a refusal may be justifiable, when absolutely necessary to prevent the loss of the right; but I think very bad consequences would follow from admitting that any thing else would justify it. As long as the obligations of the master, to allow the crew to lay their complaints before the consul, and of the crew to obey his orders and do their duty on board, can be reconciled, they must be; and I see nothing in this case which made the latter inconsistent with the former.

But, in my judgment, the claim of the crew to see the consul, and their refusal to do duty until they should see him, cannot be supported by this act, because their complaint was not one which the act was designed to enable them to lay before him.

It can hardly be supposed that Congress intended to

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secure to the crew the fullest liberty to apply to the consul concerning any matter or thing, of which they or any of them might desire to complain. Some practical result of such complaint, by means of some jurisdiction of the consul over its subject-matter, must be considered to have been the purpose of this provision of the act.

To secure to the crew the right to land, or to impose on the consul the duty of immediately repairing on board, merely that he might hear and do nothing, because he had no power to do any thing, cannot have been intended. Nor is any such intent indicated by the language of this law. It says, "to lay their complaints before the consul," &c. What complaints? This question is answered by the act, which provides, in clause nine, for a complaint by a mariner to a consul, that he is detained contrary to his agreement, or after he has fulfilled it, and which directs how the consul is to inquire into the truth of the complaint, and what he may do if he finds it well founded; and by clauses twelve to fifteen, inclusive, which authorize a complaint to the consul concerning the seaworthiness of the vessel, and point out what proceedings shall be had, and what jurisdiction shall be exercised by the consul upon such complaint. When, therefore, the next clause says the crew shall have the fullest liberty to lay their complaints before the consul, the natural meaning is, the complaints which, by this act, they are authorized to make, and he required to hear; and this meaning is made quite plain by the concluding words of this clause, which require the consul (in case the crew cannot land) to repair on board, and "inquire into the causes of the complaint, and *proceed thereon as this act directs.*" If he is to do this when he goes to them, I presume he is to do the same when they come to him; and, if so, it necessarily follows, that the complaints which they have, by this act, a right to lay

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before him, are complaints upon which the consul can "proceed" as this act directs. Not that they must be well founded, in part or in whole, but that their subject-matter must be such that, if well founded, the consul, by this act, has authority to proceed thereon.

Now, I do not find in this act, or elsewhere, that power is conferred on a consul of the United States to take cognizance of a complaint by a part of the crew, that the mate had threatened to beat out their brains with a hand-spike, followed by an appeal by the mate to the principal party in the quarrel, desiring him to think no more about it; or, to state it more abstractly, I do not find that a consul has power, upon the application of the crew, to inquire into quarrels of this nature. The only approach towards such a case is in the seventeenth clause of the act, which is in the following words: "In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged," &c. It is to be borne in mind that this is a new power, conferred on the consul for the first time; that it is a power to dissolve a contract, or rather, authoritatively and finally to declare that it has been so far broken by one party that the other party is no longer under obligation to perform it; that this is a very high power, and, consequently, is not to be extended to a case not fairly within the words of the act, which apply only to a particular class of cases, where deserters are apprehended, and the desertion was caused by unusual or cruel treatment; and fall far short of cases like this, where, at the worst, only threats have been uttered.

I am clear, therefore, that the refusal of the men to do duty can find no justification in this act; that this reference, especially after the mate had asked the principal

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party to the quarrel to think no more about it, is strong evidence of an insubordinate temper, and justified the master in applying to the consul. That he did so apply, I am satisfied; his answer so states; and though an answer has no technical effect as evidence, it is not wholly without weight in considering his conduct. There is nothing in the case tending to contradict this allegation in the answer, and the certificate of the consul, which is made evidence in the case, proves such application to him. Being satisfied, then, that the master did apply to the consul, and that he had, in point of fact, a case to lay before him, in which five out of seven of his crew, after a fight between one or more of them and the mate, had unjustifiably refused to do duty on board, I do not think it reasonable to doubt that he did lay this case before him, as he swears in his answer, especially when the consul certifies that on that day he acted officially, on the very ground that these men had refused to do duty on board. Nor can I come to any other conclusion than that the interposition of the local authorities was by the procurement of the consul. It is true the men both testify that the consul did not see them on that day; but so far as this tends to show that the consul did not interpose at all on that day, it is directly met by the answer, which says that the consul himself sent the officer, who removed the men from the vessel, and the consul's certificate declares, in so many words, that he ordered the men to be imprisoned for safe keeping, in the Royal Prison. I must consider the imprisonment of these men, therefore, as an act of the local authorities, done upon the request of the consul, by reason of information given him by the master, that the men had unlawfully refused to do duty on board. And the question is, whether the master is responsible for their imprisonment, as for a tort. Prior to the Act of Congress of the 20th

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July, 1840, it had repeatedly been decided,¹ that a master could not lawfully imprison a seaman on shore, unless he were unable to restrain him on board; that a case of urgent necessity must be made out; and that, although it would be a mark of good faith, on the part of the master, to take the advice of a consul, as being a person confided in by the government, for many purposes, yet such advice would not be otherwise operative to protect the master, because consuls had no power or duty in reference to the matter. I am satisfied of the correctness of these decisions, but I think the Act of 1840 has materially changed the relation of consuls to this subject. The eleventh clause of the Act is as follows: "It shall be the duty of consuls and commercial agents to reclaim deserters, and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid, and use their exertions to that end, in the most effectual manner."

This certainly confers on consuls authority, and in strong terms makes it their duty, to employ the local authorities, to discountenance insubordination, where they can be usefully employed for that purpose; and, by a necessary implication, the consul must judge and determine, whether any particular case is one in which they may usefully be employed. Certainly his decision is not final. If he is guilty of any malversation, or abuse of power, the eighteenth clause of this Act makes him liable to any injured person for all damage occasioned thereby, as well as to be punished criminally. But I think it was

¹ *United States v. Ruggles*, 5 Mason, R. 192; *Jay v. Almy*, 1 W. & M. R. 262; *Wilson v. Brig Mary*, Gilpin, R. 31; *Magee v. Ship Moss*, Gilpin, R. 219; *The Nimrod*, Ware, R. 9; *The D. Patt*, Ware, R. 503.

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the intention of the Act to intrust him with power officially to invoke the aid of the local authorities, subject always to a just responsibility for any abuse of this power.

If the local authorities are to be used, it is a reasonable, not to say necessary, inference, that they are to act in such manner, and by such means as they ordinarily employ; and the most common and obvious means are the use of a place of confinement, under the control of the local government. The power, in the most effectual manner to lend their aid, and use their exertions to employ the local authorities to discountenance insubordination, can hardly be said to be exhausted, while the means most usually employed by those authorities have not been used. I think, therefore, that this Act conferred upon consuls the power, and made it their duty, where the local authorities can, in their judgment, fairly exercised, be usefully employed to restrain a part, or the whole, of a crew, who are in a state of insubordination, to use their exertions to that end, in the most effectual manner, and that this restraint may be exercised by confinement on shore, in such place as is ordinarily used by the local authorities for similar purposes. And further, that the consul, in so doing, acts as a public officer, upon his official responsibility, intrusted with the power to judge in the first instance, of the propriety and fitness of so doing, and subject to his responsibility to any injured by an abuse of his power.

The reasons which have led courts to determine that it was not one of the ordinary powers of a master to imprison his men on shore, do not exist, or apply with greatly diminished force, to the action of a consul in that behalf, on the information of the master. A public officer is thus interposed between the master and the seaman, who is to act under his official responsibility to the government, whose servant he is, as well as to the party who is affected

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by his act; he is a resident at the place, and cannot sail away, and leave the man to suffer or die in a foreign prison. He is intrusted by law with the care of destitute seamen, and with their return to their own country. It is to be presumed that he will have a due regard to the safety and rights of all, and, while he discountenances insubordination, by every means in his power, that he will not employ the local authorities in a way to oppress the seamen of the United States. But whatever may have been the reasons which operated to produce this law, I think it has conferred on consuls the power above described. If this be so, it is quite clear that the responsibility of the master is modified. If the consul may judge when the local authorities may usefully be employed, it would be a great hardship to hold the master responsible for a mere error of judgment of a public officer, in whose appointment he had no voice, and who is in no just sense his agent. At the same time, if the consul acts on the application of the master, the master is not free from responsibility. In the first place, he is bound to represent the case truly to the consul, and, in the next place, the case must be such that he, as a reasonable man, can honestly believe it to be within the power of the consul. If he knows, or ought to know, that it is not a case in which the local authorities should be appealed to, or in the words of the Act, in which they can be usefully employed, then he necessarily knows that the case is not within the limited power of the consul, and that, consequently, he cannot shelter himself under his authority. But if the master represents the facts truly,—if the facts are such that a competent master might well believe that the local authorities might be usefully employed, and the consul so considers, and applies to them, and they, at the consul's request, take the men on shore, and there confine them, in the place and manner usual at

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such port, I think the master is not guilty of any tort, although, upon a review of all the facts, the Court might be of opinion, that it was not strictly necessary to remove the men from the ship.

Applying these views to this case, I find no evidence that the master misrepresented the facts to the consul, and I am not able to come to the conclusion that the case was of such a nature that the master ought to have known that the local authorities could not usefully be employed in the way they were employed. Five out of seven of his crew had unlawfully refused to do duty ; they had been appealed to by the mate, who alone had given them any cause of complaint, in a manner calculated to allay any apprehensions which they might have entertained, but they still refused. Each had been required, by the master, to return to his duty, and each had distinctly refused.

The deserter who was on board could hardly be relied on for any very effectual assistance, and one officer, and one man, and a boy, were all that were left ; under these circumstances, some masters might, and probably would, have reduced these men to obedience, on board the ship ; but I cannot say that it was a case where the master ought to have known that that was the only proper course, and therefore I am of opinion that the master is not responsible for a tort by reason of their imprisonment. Nor do I think he incurred that responsibility by their remaining in prison. It is quite clear that he was anxious to have them return to their duty, and gave them early and repeated opportunities to do so. They steadily refused, alleging that they were afraid for their lives, if they should return on board. If five able-bodied men really had such fear of the master and mate, who alone had shown any disposition to injure them, simply because of some threats uttered in the heat of blood, it seems to me to have been an

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unreasonable fear. It is observable that neither of the libellants asserts, in his libel or his testimony, that he did really entertain such fear. Their justification for their refusal to return to the ship resting solely on this fear, I think they should have pleaded it as a fact, and sworn to it as a fact, and not allowed it to rest solely on their statements at the time, which do not seem to have had a reasonable foundation in the occurrences as they detail them.

After they had been in prison some days, the answer says eight days, and after repeated refusals to go on board, or do any duty if forced on board, the consul discharged them from the vessel, the master shipped other men in their place, paid to the consul fifty dollars for their passage money to the United States, and one hundred dollars more for expenses arising out of their arrest, and board in prison, and from that time the answer avers that the master had no control over, or connection with them, and that whatever was done, was by the consul alone. The Act of 1840 empowers consuls, upon the application of the master and any mariner, to discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages. I do not understand, from any of the proofs, that these men applied in terms for their discharge; but I think their unjustifiable refusal to go on board, or do any duty if forced on board, would enable the consul to act upon the request of the master, and discharge them, and the men themselves evidently considered that they had in effect requested their discharge, for they have made no claim to be paid any wages. After they were thus discharged, I consider the consul, and not the master, responsible for their further detention. They no longer formed part of his crew; he no longer sustained any relation to them. The answer declares he did nothing to cause their further detention, and there is not sufficient proof to the contrary.

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I am of opinion, therefore, that the responsibility for their further detention must rest with the consul by whose orders they were originally put in prison, and at whose sole instance they were kept there, after they were discharged from the bark. The answer states, that the consul said something to the master about sending them home to be tried; and if he considered it his duty to detain them, by aid of the local authorities, that he might send them to the United States for that purpose, his conduct might be justified. On any other ground it was grossly-improper; for he had no right to punish them by imprisonment; and surely, destitute seamen are not to be provided for by a consul by keeping them in a foreign jail.

There is one other cause of action set forth in these libels, which requires to be distinctly considered. It is, that the men were sent to the jail without any clothing or bedding, which was detained on board the bark, and finally sold by the master. It is in proof, that the libellants slept on the flag-stones, using their boots for pillows; and that, during all the time they were in prison, they had no clothes except the working-dress in which each was when taken on shore. This detention of their clothing is not justified; and no excuse is attempted, except that the answer alleges that the consul told the master their clothing was forfeited. But it does not appear when this information was given, and it is difficult to see how it could have been supposed to be correct. Before the men had finally refused to return on board, and while it was yet uncertain whether they would return, there could be no pretence for treating them as deserters; and when it became certain that they would not voluntarily return, they were regularly discharged, and desertion became impossible. I consider it to have been a breach of duty by the master, and a wrong to these men of a somewhat aggravated character, to detain all their

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clothing from them during eight days, and then sail away and finally deprive them of it. I shall therefore allow to each the pecuniary value of his clothing, together with the sum of eight dollars, for special damages, arising from its detention while in prison. From analogy to the rule followed by Judge Hopkinson, in the case of *The Maiden*, Gilpin's R. 294, I should deduct a proportional part of the prison fees and expenses and the cost of shipping the new men, if I did not consider that the wages remaining unpaid to each of these men at the time of their discharge was just about a fair compensation for their proportions of these charges; and it seems to me that, under the circumstances, it is just that the ship should neither lose nor gain by their discharge. It is not easy to affix a value to the clothing of each libellant. It is sworn to be worth from eighty to one hundred dollars for each; and the answer puts it at very much less sums. Upon the best judgment which I can form, I think the sum of forty-eight dollars will be a just allowance for the clothing and the special damage of each. This sum is therefore awarded to each libellant. I do not allow any costs of the appeal to either party. The decree of the Court below will be modified accordingly.

I desire to add, that it is stated at the bar, that the evidence upon which the appeal has been heard is not identically the same as in the District Court; and that several of the questions which have now been decided were not there raised.

**CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.**

RHODE ISLAND DISTRICT, NOVEMBER TERM, 1851.

BEFORE { **Hon. BENJAMIN R. CURTIS**, Associate Justice of the Supreme Court.
 { **Hon. JOHN PITMAN**, District Judge.

THE SHIP ADOLPH AND CARGO.

A foreign consul has authority to petition the Court to order the marshal to pay into the registry proceeds of a sale of property libelled for salvage, in which the citizens or subjects of his country are interested, they being absent, and having no other legal representative in the United States.

A suit for the salvage of the said vessel and cargo having come into this court by appeal, salvage was decreed to the libellants, at the November term, 1839, and the residue of the proceeds of the saved property, after payment of the salvage, was, by the decree, directed to be retained in the registry of the court, to be paid to the owners of the property saved, or their lawful representatives.

When the proceeds of the sale were brought into court

The Ship Adolph.

by the then marshal, who is no longer in office, one promissory note, given by a purchaser, remained unpaid. The marshal caused a suit to be brought thereon, and collected the contents upon an execution; but, instead of bringing the money into the registry of the court, accounted, as he alleges, with the salvors out of court, and retained the balance to reimburse himself for sundry payments, and for his own services.

In July last, F. Gouraud, representing himself to be vice-consul of France for this district, and also attorney in fact of the representative of the owners of the said vessel, filed a petition in this court, praying that the late marshal might be ordered to bring the amount so collected by him into the registry of the court. The authority of M. Gouraud to prefer this petition was denied. He produced his *exequatur*, which bears date on the 29th day of October, 1851. He also exhibited a power of attorney, executed before two notaries at Nantz, by a person who states, in the power, that he was appointed by the Tribunal of Commerce of the city of Nantz, settling agent of the old commercial house formerly established at Nantz, under the style of James Francis's Brothers, who were the owners of the Adolph; this power purports to authorize M. Gouraud to collect any money arising from the sale of the said vessel.

The questions were argued by *J. S. Pitman*, for the petitioner, and by *Jenckes*, for the respondent.

The opinion of the Court was delivered by

CURTIS, J. The duty of the marshal to pay this money into the registry of the court, as soon as he had received it, is clear. He had no power to adjust the account with the salvors, or pay them, or retain any thing for his own services; these are all matters to be passed on by the

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Court; and under its direction, and only by its authority, can any payments be made or allowances had. It may be added, that it is the duty of the Court to see that its officer does pay into the registry money which he has collected for that purpose; and although the Court cannot have the necessary information to act upon its own motion, it certainly ought not to be very rigid in its requisitions of authority, when a suggestion that its officer is in fault in this respect is made. We deem it sufficient for this particular purpose, that M. Gouraud is the Vice-Consul of France; and that French citizens are interested in these proceeds.¹ It is true, he had not received his *exequatur* when he filed this petition; and if this were a suit instituted by him, and depending on his official character when brought, it must fail. But we do not consider the proceeding at all analogous to a suit, or even to a petition for the execution of a decree. It is rather in the nature of a suggestion, made in writing to the Court, that one of its officers has not discharged his official duty; and, although the person making such suggestion may not have had any official or personal connection with the subject when first made, if he has now, when the matter is actually presented to the Court, sufficient authority to make it, the Court feel bound to listen, and allow it to have effect. Upon this suggestion and representation, we find, by the answer of the late marshal, that he did receive this money on account of the proceeds of the sale of a part of the salvage property; and, although we have no doubt he thought himself justified in retaining it, and did not intend to depart from his duty, he must be now required to pay it into the registry of the Court.

¹ *The Invincible*, 1 Wheat. R. 239; *The Ann*, 3 Wheat. R. 439; *Divina Pastora*, 4 Wheat. 52; *Bella*, 6 Wheat. 156; 2 Cranch, 242; 1 Mason, 372.

Randall & Stead v. Rhodes.

Order.

That Burrington Anthony, lately Marshal of the United States for the District of Rhode Island, forthwith pay into the registry of this Court, in the cause wherein Caleb Williams and others were libellants against the ship Adolph and cargo, the moneys received by him on account of two certain promissory notes, given by one Edward Dexter, the purchaser of part of the property libelled in the said cause; and all claims of the said Anthony, for any just allowances on account of the said moneys, or otherwise in the said cause, be referred to Francis E. Hoppin, Esq., to report thereon to the Court. And all parties in interest, or their legal representatives, may appear before the said assessor, and be heard in the premises. And all further questions are reserved until the coming in of the said report.

Entered by order of the Court.

JOHN T. PITMAN, *Clerk.*

November Term, A. D. 1851, 6th day.

RANDALL & STEAD vs. J. & P. RHODES.

If a representation is made in the course of a negotiation for a sale, and the contract of sale is afterwards reduced to writing and signed, and does not contain the representation, it is excluded from the contract, and does not amount to a warranty.

Where a writing was signed, which stated that a sale had been made, and described the article sold, and the price and terms of credit, it was held to be the written contract of sale; and that representations in letters, written before the making of the contract, and not referred to therein, could not be received to prove a warranty.

THIS was an action of assumpsit, founded on a war-

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ranty that a vessel, called the *Baltic*, was built mostly of white oak timber. It appeared that, in July, 1851, negotiations for a sale of the vessel were had between the parties, through the agency of W. W. Brown, a ship-broker, who was originally employed by the plaintiffs, but was subsequently authorized by the defendants to make a sale, at a price fixed by them. While the negotiations were going on, Brown wrote to the plaintiffs several letters, one of which contained a representation that the vessel was built mostly of white oak timber. The plaintiffs applied for permission to bore the vessel, to ascertain her materials and their soundness, but the defendants refused to allow this to be done. On the 12th of July, 1851, the sale was agreed on, and the defendants signed a written memorandum, which was as follows:—

PROVIDENCE, *July 12, 1851.*

We have sold to Randall & Stead, this day, through W. Whipple Brown, the bark *Baltic*, now at East Boston, for twelve thousand eight hundred dollars, to be paid next Tuesday, as follows: twenty-five hundred dollars cash, their note, thirty days, interest added, for five thousand one hundred and fifty dollars, indorsed by Thomas J. Stead, of this city, and their note for five thousand one hundred and fifty dollars, interest added, sixty days, indorsed by Thomas J. Stead. Full packages of beef, pork, bread, and flour are to be taken out by the owners, all other small stores belonging with the vessel.

Signed, J. & P. RHODES.

A corresponding paper, setting forth the purchase, was signed by the plaintiffs.

The breach relied on was, that only a small part of the frame of the bark was found, on examination, to be white oak.

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The counsel for the plaintiffs were *Ames* and *Jenckes*, and for the defendants *Carpenter* and *Bradley*.

The opinion of the Court was delivered by

CURTIS, J. There is no doubt that a representation, intended by the vendor as a warranty, and acted on as such by the vendee, amounts in law to a warranty; and it is also well settled that such representation so operates, although made during the treaty for a sale, and some days before the sale was finally agreed upon, if it appear that it was not withdrawn, and the contract of sale did not exclude it from its terms. But the question now presented is, whether the representation relied on was not excluded from the contract of sale, so as to form no part thereof. It is not contained in the written memorandum, signed by the defendants. Now, the general rule is that, when negotiations have terminated in a written contract, the parties thereby tacitly affirm that such writing contains the whole contract, and no new terms are allowed to be added to it by extraneous evidence. But it is argued that this memorandum is not the written contract of sale; that it contains only a statement of the fact that a sale has been made, and a description of the thing sold, the price and terms of credit. But this is all that is necessary to make a complete contract of sale; and to assume that any thing more existed, and allow it to be shown, would violate the rule above stated. It is true that, in *Bradford v. Manly*, 13 Mass. R. 139, and *Hastings v. Lovering*, 2 Pick. 214, it was held, that a bill of parcels was not the contract of sale, it being intended, as the Court says, in the first of those cases, only as a receipt for the price, and not to show the terms of the bargain. But here the writing could not have been intended for a receipt, and must have been intended to set forth, what it does set forth, a contract of sale; and,

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if so, it must be taken to embrace the whole contract, and consequently a warranty was not one of its terms.

It is argued that the reference to Brown, contained in the contract, may be sufficient to incorporate into it the letters which he wrote in the course of his agency, and which led to the making of the contract. These letters might have been so referred to as to make their contents part of the contract; but to have this effect, the contract must show that such was the intention of the parties. This intention does not appear by the reference to Brown's agency. The natural meaning of that reference is, only that Brown was the agent through whom *the contract of sale, shown by the writing*, was negotiated. There is nothing to show that the parties agreed to make all he had done and said part of the contract.

I am of opinion that the plaintiffs are not entitled to recover; and, unless they elect to become nonsuit, the jury will be directed accordingly.¹

The DISTRICT JUDGE concurred in the opinion, and the plaintiffs became nonsuit.

IN THE MATTER OF WILLIAM STOVER, AGENT FOR THE
CLAIMANTS OF CERTAIN FISHING VESSELS, AND OF JOHN
T. PITMAN, CLERK OF THIS COURT.

The eighth section of the Act of February 8, 1799, (1 Stat. at Large, 626,) does not direct the fees paid by the claimant to the officers of the court, to be repaid by the United States; it applies only to the costs of the prosecution, not of the defence.

WILLIAM STOVER, who represents the claimants of cer-

¹ See *Lamb v. Crafts*, 12 Met. R. 354.

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tain fishing vessels, shows by his petition that, in June, 1847, these vessels were seized and libelled in the District Court of the United States for the District of Rhode Island, on account of an alleged violation of the laws of the United States; and that the petitioner having intervened, and claimed the vessels in behalf of the owners thereof, was obliged to pay to the officers of the court certain fees, growing out of their seizure, custody, and delivery on bail, and the trial of the suits instituted upon the seizures; that, by decrees of the District Court, the libels were dismissed, and appeals were taken, and the causes brought to this Court; that, upon a hearing by this Court, the libels were dismissed, without costs to the libellants or claimants; but directing that the taxable fees of the officers of the court, in the District as well as the Circuit Court, in all the proceedings connected with the said seizures and since their commencement, be paid as directed by the Act of Congress of February 28, 1799; and, at the same time, this Court granted to the officer of the United States, by whom the seizures were made, certificate of probable cause. The petitioner further alleges, that he has applied to the clerk of this Court and the other officers, to refund the money so paid by him, but they refuse, alleging that the United States has refused to pay the same to them; and the petitioner prays for an order, to compel the officers to refund to him the amount paid by him.

The petition of the clerk states substantially the same facts respecting the decree and certificate of probable cause; and that, by direction of the Court, all the fees of the officers, both in the Circuit and District Court, connected with the said seizures, including all the fees which form the subject of Stover's petition, were taxed, and having been allowed by the Court, were forwarded to the proper department at Washington for payment, on or about

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the 4th day of August, 1848; and that, in January, 1850, the Controller of the Treasury refused to allow, of the said fees, the sum of \$599.30, including the fees which are the subject of Stover's petition, on the ground that they were not due from the United States, but were for services rendered to the claimants, and were to be borne and paid by them. That there is now due to the petitioner, for his fees, the sum of \$531.30, besides the amount paid him by the said claimants; and he prays for an order to compel the claimants to pay the same.

A similar petition having been filed by Stover in the District Court, touching the fees of the officers of that court in the same suits, while pending therein, it was remitted to this court, by an order of the District Judge, on account of his relationship to the clerk, who is one of the parties respondent to the last mentioned petition.

The opinion of the Court was delivered by

CURTIS, J. Stover's petition rests upon the ground that, by the final decree of the Circuit Court, pronounced by the late Mr. Justice Woodbury, he was entitled to have the sums due to the officers of the court, for services to him as claimant in these suits, paid by the United States; and, in consequence thereof, that the officers of the court are bound to repay to him what he has heretofore advanced to them on that account. The decree of this Court was in the following words:—

This cause came up upon a *pro formâ* decree on appeal from the District Court, and was heard upon the libel, under depositions and other pleadings in the case. On consideration whereof, it was ordered, adjudged, and decreed by the Court here, that the libel be, and the same is hereby, dismissed, without costs to the libellants or the

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claimants. And it is further ordered, that the taxable fees of the officers of the court, in the District as well as in the Circuit Court, in all the proceedings connected with this seizure since its commencement, be paid as directed by the Act of Congress of February 28, 1799.

LEVI WOODBURY,

Associate Justice of the Supreme Court.

JOHN PITMAN,

District Judge, United States, for Rhode Island District.

Entered by order of Court.

JOHN T. PITMAN, *Clerk.*

The concluding clause of this decree, requiring the fees of the officers of the court to be paid as directed by the Act of Congress of February 8, 1799, it becomes necessary to decide, whether the fees for services rendered by the officers to the claimants are embraced within that act.

The 8th section of the Act of 1799, (1 Stat. at Large, 626,) is as follows: That if any informer on a penal statute, and to whom the penalty, or any part thereof, if recovered, is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if, upon trial, judgment shall be rendered in favor of the defendant, unless such informer be an officer of the United States, he shall be alone liable to the clerks, marshals, and attorneys for the fees of such prosecution; but if such an informer be an officer, whose duty it is to commence such prosecution, and the Court shall certify there was reasonable ground for the same, then the United States shall be responsible for such fees.

In these cases, the informer was a revenue officer of the United States, and the Court has certified that there was reasonable ground for the prosecutions; so that the ques-

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tion is, whether the words, "the fees of such prosecution," extend to and include fees paid to the clerk and marshal, by the claimant, for services rendered to him in the course of the proceedings.

There is nothing in the language of this section which indicates an intent to confer on the claimant any new right to recover his costs or expenses. The apparent object of the law, and the whole effect of its terms, are, to point out the party to whom the officers of the court are to look for payment of their fees for the prosecution of this class of cases.

If the informer is an officer, charged with the duty of commencing such prosecutions, and he obtains from the Court a certificate of probable cause, this act directs that the fees of such prosecution be paid by the United States, otherwise the informer alone is to be liable therefor. And before we can say this law imposes on the United States the payment of fees which the claimant has expended in defence of his property, we ought to find some law which gives him a right to recover those fees. Because if the claimant, under no circumstances, can have a title against any one to recover those fees, it cannot be that they were intended to be embraced within the terms of this law, which simply points out the party who is to be responsible to the officer, but gives no new right to the claimant.

Now, by the Act of February 24, 1807, (2 Stat. at Large, 422,) it is enacted, that when a seizure like this is made, and probable cause certified, the claimant shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to any action, suit, or judgment, on account of such seizure and prosecution. This effectually debars the claimant from any recovery for these expenses. For, although the term costs is not identical with fees of clerk and marshal, it necessarily includes

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them; and if the claimant cannot recover any costs, he cannot recover these fees. And if he is not entitled to them, it is very plain they cannot be included within the 8th section of the Act of 1799, for if they were, he would be entitled to them as against the United States.

Moreover, the Act of July 22, 1813, s. 2, (3 Stat. at Large, 21,) provides that, in case judgment shall pass in favor of the claimant, he shall be entitled to his property "upon paying only his own costs." I suppose it is not doubted that, pursuant to this act, he is to pay his costs, including the fees now in question; but the assumption is, that, after he has paid them, the clerk and marshal are to claim and receive from the United States the fees thus paid to them by the claimant, and then are to repay the same to him. But, aside from the extraordinary and anomalous character of such a proceeding, and the improbability that it was intended by Congress, several reasons concur to prove that the Act of 1799 is not susceptible of such a construction.

In the first place, the very terms, "fees of such prosecution," certainly do not naturally indicate fees incurred in the defence against such a prosecution. In the next place, the act declares that, in one event, "the informer shall be *alone* liable to the clerks, marshals, and attorneys, for the fees of such prosecution." Now, it is plain, the claimant is liable to the clerk and marshal for their fees, for services rendered to him in making his claim and defence. He is so on general principles, according to the case of *Caldwell v. Jackson*, 7 Cranch, 276; and this liability is affirmed by the Act of 1813, above referred to. This strongly tends to prove, that the fees of the prosecution, spoken of by the Act of 1799, are not the fees paid by the claimant; for certainly it was not intended to exempt the claimant, in the first instance, from all liability therefor, and impose

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that liability on the informer alone. In *Caldwell v. Jackson*, the Supreme Court held, that each party is liable to the clerk for his fees, for services performed for such party, and it is immaterial to the clerk which party recovers judgment. When, therefore, the Act of 1799 speaks of fees of the prosecution, for which the informer alone is to be liable to the clerk, the sound construction must be, that he is made liable for fees for services rendered to the party prosecuting, and for those only, and of course the United States are liable for the same, and none other, when, as in this case, the informer is an officer, and a certificate of probable cause is given.

I am of opinion that the decree of this Court, ordering the fees of the officers to be paid as directed by the Act of 1799, must be construed to refer only to the fees due from the prosecutor, and that it gave no title to the claimant, or the officers of the court, to have, from the United States, the fees paid by the claimant for services rendered to him.

His petition must therefore be dismissed; but as the terms of the decree on which he rested his petition, involved a new question of construction of the Act of 1799, I shall direct that no costs be taken by either party. I shall not make any order at this time concerning the clerk's petition, understanding that none will probably be necessary, now that the respective rights of the parties are ascertained. But if the fees still remaining due shall not be paid, an attachment must issue to compel their payment.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MASSACHUSETTS DISTRICT, MAY TERM, 1852.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. PELEG SPRAGUE, District Judge.

EZEKIEL BYAM *et al.* vs. BULLARD *et al.*

A sale of the thing patented, to an agent of the patentee, employed by him to make the purchase, on account of the patentee, is not, *per se*, an infringement.

Accompanied by other circumstances, it may be evidence of an infringement.

THIS was an action on the case for an infringement of a patent-right for the manufacture of loco-foco matches, belonging to the plaintiffs.

It came before the Court on a statement of facts, wherein it was agreed that, before the date of the writ, the defendants sold, to an agent of the plaintiffs, who was employed by the plaintiffs to make the purchase, matches, of the value of six cents. That such sale, if made to any other person than the plaintiffs, or their agent, would have been an infringement of the patent; and the questions submitted were whether such a sale was an infringement, and if so, what was the measure of damages.

Byam *et al.* v. Bullard *et al.*

The case was argued by *Charles Sumner*, for the plaintiffs, and *William Brigham*, for the defendants.

The opinion of the Court was delivered by

CURTIS, J. The Act of July 4, 1836, section 14, enables patentees and their assignees to bring actions on the case, to recover damages for making, using, or selling the thing, whereof the exclusive right is secured by a patent. Two inquiries arise in this case. The first is, whether, upon the facts stated, the law imports either the damage, or the injury, both which are necessary, by the common law, to support an action on this case. The second is, whether an action on the case, for the violation of a patent-right, was intended to be given by the Patent Act, where there was neither damage nor injury received, according to the principles of the common law. As to the injury, the general rule of the common law is, *volenti non fit injuria*; and, in accordance with this maxim, no one can maintain an action for a wrong, where he has consented, or contributed to the act of which he complains. And this principle has been applied to numerous cases in which, though the defendant was in the wrong, the plaintiff's negligence had contributed to produce the consequential damages which were sought to be recovered in the action. Here, the plaintiffs not only consented, but coöperated; for, through their agents, they were themselves the purchasers. As to the damage, it is true that, in general, the law imports damage from the violation of a right, but I am not aware that damage has ever been presumed by law from an act in which the plaintiff coöperated, and which, therefore, must be supposed to have been done for his own benefit, or at least not to have been to his loss.

It was argued that, *ex necessitate rei*, such a sale should be held to be an infringement, because it is only by such

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evidence that an infringement of many patents can be shown. This may be sufficient to prove that such a sale may be evidence of an infringement, and that from such a sale, accompanied by other circumstances likely to exist, and capable of being proved if the defendant does infringe, a jury would be warranted in finding an infringement by sales to others than the patentee.

If the plaintiffs' agent purchased the matches at a shop where matches and similar articles may be expected to be found for sale, if they were sold to him in the usual course of the trade there, and if he saw others exposed for sale, it would be a natural inference for a jury to make, that this was not the only parcel sold; that, in the course of the defendant's business, he had sold what he showed himself willing and desirous of selling, and what customers are frequently in the habit of buying, and I know of no rule of law which would restrain them from drawing such an inference. But it is a very different question, whether such a sale is itself an infringement. Thus, in *Hall v. Boot*, Webs. P. C. 100, the patent was for a process of singeing off the superfluous fibres from lace by means of the flame of gas. The evidence of infringement was that the defendant had secretly prepared an apparatus similar to that used by the patentee, and had sold lace in a state to which it would have been brought by using the patented process.

A similar ruling may be found in *Huddart v. Grimshaw*, Davies, P. C. 290, and many other cases.

So in *Keplinger v. Younge*, 10 Wheaton, R. 358, it was held, that evidence from which a jury might infer that a patented machine was let to the defendant under color of a contract to buy the product of the machine, would authorize a finding of a use of the machine by the defendant.

But in neither of these cases would the naked facts,

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sworn to, have amounted to an infringement. It remained for the jury to draw from them the inference that the defendants had in fact used the thing patented. Now the argument *ex necessitate* can extend no further than the supposed necessity extends, and that is, at the utmost, only to make such a sale evidence of an infringement, which stops short of its being an infringement. It was also argued that this was not a sale to the plaintiffs, except by construction of law, but only to their agent, and that, for the benefit of patentees, the law would not deem it the same as a sale to the plaintiffs. I can see no reason for making a distinction between patentees and other persons in this particular, and if I am at liberty to disregard a plain rule of law, for the benefit of patentees, I should very much doubt whether it would be for their advantage to hold that the acts of their agents were not their own.

Nor can I find any solid foundation on which to rest the right of a patentee to support an action on the case for the violation of his exclusive right, except that settled and reasonable common-law basis of all such actions, injury and damage; injury by a violation of the incorporeal right, and damage, at least nominal, presumed by the law to arise from such violation. Such I understand to have been the principle proceeded upon by Mr. Justice Story, in *Whittemore v. Cutter*, 1 Gall. R. 429, where he held that making a machine for a philosophical experiment, or to test the sufficiency of the specification, would not be an infringement; and in *Sawin v. Guild*, 1 Gall. R. 487, where he says the act must be with intent to deprive the patentees of some lawful profit; and also by Mr. Justice Patteson, in *Jones v. Pearce*, Web. P. C. 125, where he excepts the making of a patented article for mere amusement, and not for profit. In these cases, inasmuch as there was supposed to be no damage, there was thought

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to be no action. And though I am rather disposed, with Mr. Justice Washington, (in *Watson v. Bladen*, 4 Washington, 583,) to doubt whether the assumption is correct, that in such cases there is no damage; yet if the assumption be correct, I think the inference is sound that no action lies.

It is true some of the patent acts which were repealed by the Act of 1836 gave an action for a sale, if made without the consent, *in writing*, of the patentee, or of his assigns. But the law now in force contains no such provision; and if it did, I should still be of the opinion, that a sale to the patentee himself was not such a sale as was intended by the statute; that no sale was within its meaning, except one which would be within the terms of the grant contained in the letters-patent, which is a grant of an exclusive right to make, use, and *vend to others* to be used. In this case, I am of opinion that the sale to the plaintiffs' agent was a sale to them, and that such a sale is not, *per se*, an infringement. On a statement of facts, I am not at liberty to draw any inferences, and the judgment must be for the defendants.

ALBERT WEBB *et al.* LIBELLANTS, *vs.* DAVID PEIRCE, JR.,
RESPONDENT.

Where a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, having thereby the entire possession, command, and navigation of the vessel, and the relation of principal and agent not existing between the master and owners, the master thereby becomes the owner, *pro hac vice*, during such time as the contract exists; and he, and not the general owner, is responsible for necessary supplies.

THIS was an appeal from a decree of the District Court

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of the United States for the District of Massachusetts, sitting in admiralty. The libellants sought to recover of the respondent, who was the general owner of the brig Antoinette, belonging to Belfast, in the State of Maine, the price of certain supplies furnished by them to the master of that brig, in the city of Boston. The facts sufficiently appear in the opinion of the Court, which was delivered by

CURTIS, J. It is proved in this case, and not denied, that the libellants furnished the supplies mentioned in the schedule annexed to the libel; that they were ordered by the master of the brig, and were suitable and necessary; and that, at the time when the supplies were furnished, the respondent was one of the general owners of the vessel. This is sufficient to make a *prima facie* case of liability; for, ordinarily, the master is the agent of the owner, clothed with authority to contract, in his behalf, for necessary supplies for the vessel, and, therefore, such contracts bind the owner personally, upon the familiar principles of the law of agency. But it is also true, that the master may not be the agent of the general owner for any purpose. A special property, carrying with it the entire possession and control, and leaving in the general owner only an interest in the nature of a reversion, may be created in a vessel as well as in any other chattel. And when such special property has been created, it necessarily follows, that the master is the agent of the owner of this special property in the vessel, and not the agent of the owner of the general or reversionary interest. The possession and control belonging to the former, and the employment being his, whatever is done by reason of that possession, and in the exercise of that control and employment, is his also, and the persons by whom it is done are his agents.

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I am aware that a different doctrine is laid down by Lord Mansfield, in *Rich v. Coe*, (Cowper, 636,) and that Mr. Justice Story, in his treatise on Agency, (s. 298,) has declared, in conformity with Lord Mansfield's opinion, that a private agreement between the owner and the master, by which the latter is to have the entire ship to his own use for a specified period, and is to make all the repairs at his own expense, cannot affect the liability of the owner to third persons, upon the well-settled principle of the law of agency, that the apparent authority of an agent may be trusted to by strangers. If the private agreement between the owner and master be of such a nature as to leave the relation of principal and agent still existing between them, it is undoubtedly true, that the owner would be bound by all contracts respecting the navigation and employment of the vessel, within the usual scope of the master's authority, notwithstanding a secret agreement between them, that the master should not thus bind the owner. But if the arrangement between the master and owner be such, that the relation of principal and agent does not exist, there is no room for the application of this principle of the law of agency, simply because there is no agency in the matter.

Now, that this relation of principal and agent, between the general owner and the master, may cease to exist, and that either the master or any third person may be clothed with a special ownership, so as to stand as a principal in respect to the navigation and employment of the vessel, is too well settled to admit of serious question. It is distinctly asserted by the Supreme Court of the United States, in *Marcardier v. Ches. Ins. Co.*, 8 Cranch, 39, and in *Gracie v. Palmer*, 8 Wheat. 605, and has been so held in numerous cases, in England and in this country, which are collected in 3 Kent's Com. 138, 139, and the doctrine

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of Lord Mansfield must be considered to be overruled by the Court of King's Bench, in *Reeve v. Davis*, 1 Adol. & El. 312. In this case, there was an agreement between the owner and the master, by which the latter was to have the vessel to his own use for the period of twelve months, to victual and man the vessel, and keep her in repair. This agreement was unknown to the plaintiff, who furnished supplies for the vessel, and sought to recover their price of the general owner, who was held not to be liable therefor. *Perry v. Osborne*, 5 Pick. 422; *Cutler v. Winsor*, 6 Pick. 335; *Winsor v. Cutts*, 7 Greenl. 261; *Sproat v. Donnell*, 26 Maine R. 185; and *Taggard v. Loring*, 16 Mass. 337; are all cases of similar contracts between the master and owner, which were held to substitute the former in place of the latter, as owner, and that the relation of principal and agent did not exist between them.

Concerning this last case, Mr. Justice Story, in *Arthur et al. v. The Schr. Cassius*, 2 Story, 93, expresses some doubt; and he held that a master, who had agreed with the owner to employ and navigate, victual and man a vessel, retaining as his compensation, as master and for his own services, one half of the freight which should be earned, could, by a charter-party, give a lien on the vessel to the shippers of merchandise. But he points out a difference between the contract of hiring in *Taggard v. Loring*, and in the case before him, and the question decided did not depend upon the rule of law now under consideration. It may well be, that the master, having for the time being the control and navigation of the vessel, may enter into charter-parties containing the usual clause, binding the ship to the merchandise and the merchandise to the ship, and that full effect would be allowed to such a clause by a court of admiralty, upon the ground that the power thus to bind the vessel to shippers, resulted from the mas-

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ter's possession, and the purposes for which he held it, wholly independent of the consideration, whether he was acting as agent or principal, or whether one person was entire owner, and the master his agent, or another person the owner, *pro hac vice*, and the master the agent of the latter. And I cannot suppose that this very eminent judge intended to cast the least doubt upon a rule of law so well settled, and which he himself had so often recognized, which enables the general owner to create a special ownership; which is thus interposed between him and all third persons as to whom the special owner is principal, and responsible as such. I understand the doubt expressed by him to have arisen in his mind, not concerning this rule of law, but as to quite a different question, viz., whether the contract in *Taggard v. Loring* was sufficient, in point of law, to create the master owner *pro hac vice*. Upon this question I think the rule is at this day perfectly well settled.

When the possession, command, and navigation of the ship are let by the general owner, the hirer becomes owner *pro hac vice*; the possession is his; the employment is his; the contracts respecting that employment are his; the master, if he employs one, is his agent; if he commands the vessel himself, he acts on his own account. In the language of Chancellor Kent, (3 Com. 138,) "this may be considered the sound and settled law on this subject."

So that, in a case like this, where the question is, whether the general owner is liable for supplies furnished to the master, we must inquire whether the general owner had parted with the possession, command, and navigation of the vessel, and thus interposed another owner, to whom the credit must be deemed to have been given. This requires an investigation of the facts of the particular case; and it is correctly argued by the libellant's counsel, that the decisions relied on by the respondent's counsel — that when

a vessel has been taken on shares, the general owner is not liable for supplies — do not necessarily apply to this case, because its facts may be different from those. Accordingly, much evidence has been introduced by both parties, relative to this contract of hiring, and its nature and incidents, a large part of which was not exhibited to the District Court.

The testimony of the master, which is not controlled, proves that he made a verbal agreement with the owners to sail the vessel on shares. He was to victual and man the vessel, and pay one half the port charges, and he and the owners were to divide the gross earnings equally. He was to go wherever he chose with the vessel, and employ her in such ways as he might think fit during an indefinite period of time. On cross-examination, he says his contract was founded on — by which I understand him to mean, in conformity with — a well-settled usage at Belfast, to let small vessels on shares; that he had no right to appoint another master in his place, and that he has no doubt the owners could at any time remove him, and that he might give up the vessel without any notice; that there was no agreement to that effect, but he so understands the usage. I have examined the letters of the master which were put into the case, but I find in them nothing inconsistent with his testimony.

Such being the contract, it is quite clear that, while it subsisted, the master had, in point of fact, the entire possession, command, and navigation of the vessel. It would be difficult to state a case of more absolute possession, command, and navigation, than that he should take the vessel, command her, victual and man her, go with her where he pleased, and employ her in such trade as he saw fit. But still, there are certain elements in the contract which require examination. The contract was for no defi-

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nite period of time; and it is urged that, by reason of this, and by force of the usage of the trade, the owners might displace the master at any time, and so he had not the possession and command as owner, or any different possession and command from those of an ordinary master, sailing the vessel solely on the owners' account.

That after a master has made such a contract as this, and has hired a crew, and purchased supplies for a particular voyage, and actually entered upon and partly completed it, the owners should have the right to turn him out of possession without notice, and thus break up an enterprise lawfully begun, and in the completion of which he has an important interest, and which is to be completed by his crew and his supplies, is so much in conflict with the nature of the contract, and the just rights of the parties flowing from it, that plenary evidence would be required to convince me of the existence of such a right. There is no reason to suppose that such a right was created in this case by any express stipulation. And the admission of the master that it existed, is rested by him solely on his understanding of the usage of trade applicable to such cases.

I do not deem it necessary to decide whether such a usage would be void on account of its unreasonableness, because I am not satisfied of its existence. The evidence is conflicting; and so much of it as tends to prove such a usage may be referred to the opinions of the owners of vessels who have testified to it, rather than to any settled practice, sufficiently general and long continued to create such a right. Indeed, no one case of removal of the master during a voyage, by force of the usage, has been clearly proved; and many persons from Belfast and other ports, long acquainted with this trade, have been examined, who appear to be ignorant of such a practice. My conclusion is that, in point of fact, there is no such usage, and that it

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results, from the nature of this contract, when it is for an indefinite period, that it amounts to an absolute and indefeasible hiring of the vessel for every voyage which shall be begun before notice, by the general owner, of his intention to discontinue the contract. And this brings the case within that class of cases which have turned on such contracts of hiring, and in which it has been held the master was owner, *pro hac vice*, and not an agent of the general owner. *Cutler v. Winsor*, 6 Pick. 335; *Perry v. Osborne*, 5 Pick. 422; *Thompson v. Hamilton*, 12 Pick. 428; *Mantler et al. v. Holmes et al.*, 10 Met. 402; *Thompson v. Snow*, 4 Greenl. 264; *Sproat v. Donnell*, 26 Maine R. 185.

The evidence respecting the usage of trade is also conflicting as to the right of the owner to control the master in his choice of a voyage, and the power of the master to appoint another master in the home port.

I do not deem it necessary to find what the usage is upon the first of these points, because the uncontradicted evidence of the master proves an agreement with the owners that he should employ the vessel as he saw fit, and while this contract existed the owners had no power to control him in this particular. It does not seem to me to be shown that, by the usage, the master to whom the vessel is let, may appoint another in his place in the home port. There is a personal confidence reposed in him by the owners, who rely on his skill to manage the employment, as well as the navigation of the vessel, and the instances of such changes, spoken of by some of the witnesses, appear to have been infrequent, and were probably sanctioned by the owners as expedient and proper, rather than acquiesced in as matter of right on the part of the hirer. But, however this may have been, it does not seem to me inconsistent with the entire possession, command, and navigation of a vessel, that the hirer is restrained from appointing a person other than himself master, any more

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than it is inconsistent with the entire possession and temporary ownership of a house, that the lessee cannot underlet or assign his lease. It is a usual incident of ownership of a vessel, whether general or special, that the owner should have power to choose and appoint the master; but I know of no rule of law, and can see nothing in the nature of the case, which requires it to be an inseparable incident of such ownership; and, therefore, the fact that the hirer must himself, personally, command the vessel, does not prove that he is not owner *pro hac vice*. It has been suggested, on the authority of *Dry v. Boswell*, 1 Campb. 329, *Skolfield et al. v. Potter et al.*, Daveis, R. 392, that the moiety of the gross freight the master retains, under such a contract, to his own use, may be considered to be in lieu of his wages as master, and so that it is only a contract of hiring of the master by the owners. But this is not consistent with the facts. The master not only commands the vessel, and manages her trade and employment, but victuals and mans her, and the moiety of the gross freight is not retained by him simply as a compensation for his services. It is more in accordance with the contract to consider the moiety of the gross freight paid to the owners, as their charter-money, for the use of the vessel. This is the view taken of the contract in the cases already referred to, and it is satisfactory to my mind. The truth undoubtedly is, as stated by Abbott, C. J., in 1 Ryan & Moody, 42, that, soon after the passage of the Registry Acts, the leaning of the English courts was to hold the registered owners liable for repairs and supplies. *Rich v. Coe* was one of those decisions. But the subject having become more accurately understood, a better principle was introduced, and more recent cases decide that the true question is, to whom was the credit given. If no intervening ownership has been created, the credit is deemed to be given to the general owner. But if the vessel is let out

to hire, the owner is no longer a contracting party for supplies, and so not liable. Such is the modern doctrine on this subject; it is now too well settled to be departed from; and I may add, that it seems to me to rest on sound principles.

My opinion is, that, when a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, he thereby becomes the owner, *pro hac vice*, during such time as the contract exists, and that he, and not the general owner, is responsible for necessary supplies. There is a circumstance in this case, not necessary, in my judgment, to its decision, but which tends strongly to strengthen the equity of the defence. It is that Webb, one of the libellants, who sold these supplies to the master, was for several years a resident of Belfast, and engaged in such business at that place that he must have been acquainted with the custom, nearly universal there, to let vessels, of the class of this brig, to the masters, on shares, and that he therefore had ample means of knowing that this vessel was so let, and that the master, and not the owners, was to victual and man the brig.

To prevent misapprehension, I desire to state, that I have examined the able opinion of Judge Ware, in *Skolfield et al. v. Potter et al.*, Daveis, R. 392, in which he charged the general owners of a vessel let on shares, with the wages of a seaman. There are elements in that case upon which the decision may rest consistently with the principles upon which this case has been decided; and I do not intend to express any opinion as to a claim for wages on a general owner, who has received freight earned in the voyage, for which wages are claimed.

The result is, that the decree of the District Court is to be reversed, and the libel dismissed, with costs.

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OTIS NORCROSS *et al.* v. PHILIP GREELY, JR.

The Tariff Act of 30th of August, 1842, explained by the Act of 3d of March, 1851, provides, that the value of the article upon which the duty is to be charged shall be ascertained in a certain manner, and that "to such value or price shall be added all costs and charges except insurance, and including in every case a charge for commissions at the usual rates." *Held*,

1. That, by the proper construction of this clause of the Act, a commission should, in all cases, be added to the invoice value, although in fact no commission is paid, and although it is not customary for the importers of the article in question to pay any commission.

2. That where the rate of the commission charged and added by the collector, is that prescribed by the Secretary of the Treasury as the usual one, it is incumbent upon the merchant to show that it is higher than the rate usually paid, when any commission is paid.

The Act of 26th of February, 1845, requires, that no action shall "be maintained against any collector to recover the amount of duties so paid, under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." The merchant paid duties upon commissions, under protest, and the protest set forth this ground of objection alone to such payment,—that the merchant "pays no such commission:" *Held*, that the protest was insufficient, and that, consequently, the action could not be maintained.

The merchant, in his suit to recover duties paid under protest, must be confined to such grounds of objection to the payment thereof as his protest contains.

THE facts of the case sufficiently appear in the opinion of the Court, which was delivered by

CURTIS, J. This is an action for money had and received, to recover from the Collector of the port of Boston an excess of duties, paid under protest by the plaintiffs, upon the importation of parcels of crockery ware, made at different dates, the earliest on the 22d day of February, 1851, and the last on the 28th day of April, 1852. The

complaint is, that in valuing the merchandise for the assessment of duties, there was added to the invoice cost, and to the other charges, a commission of two and one half per cent.

The plaintiffs have introduced evidence, tending to prove that, for many years, the usual course of trade, between England and the United States, in this species of merchandise, has been, for the dealer here to give orders for the particular articles desired by him, either to the manufacturer in England, or to some person here who was a correspondent of one or more of the English manufacturers, and accustomed to receive orders in their behalf. These persons have sometimes been agents of particular manufacturers, sent here to solicit orders for their employers. Sometimes they have been persons established in this country, to whom different manufacturers have been in the habit of transmitting their catalogues of articles and prices, together with their rates of discount, and, upon the information thus afforded, these persons have made contracts with the dealers in this country, and either transmitted the orders, for the execution of such contracts, to the manufacturers, or they have been sent by the dealers themselves; and sometimes one of these persons, making such contracts with the dealers here, and finding that his correspondents could not completely execute them, has employed an agent in England to purchase in the market what was needed to complete the orders received by him. It also appears to have occasionally, though rarely, happened, that the dealers here send orders to an agent in England, when some particular articles are desired, and they do not know to what manufacturer to apply to obtain them.

When the dealers here give orders to an agent of a manufacturer, or to a person established here, who is a

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correspondent of an English manufacturer, or send their orders themselves directly to a manufacturer, they pay no commission. In the other cases mentioned, in which the merchandise is bought in the market, either for the dealers, or for the person here who undertakes to supply the dealers, a commission is paid; and the evidence tends to prove that, in the absence of a special contract, two and a half per cent. is the usual rate of commission, when any is paid.

The legality of adding the amount of a commission, in so many of the instances now in question, as occurred after the first day of April, 1851, depends upon the first section of the Act of the 3d of March, 1851, (9 Stat. at Large, 629,) which went into operation on that day. Eleven of the importations having been made prior to that day, are governed by the sixteenth section of the Act of the 30th of August, 1842, (5 Stat. at Large, 563.) But this difference is not material, the language of the two acts touching commissions, being the same, the last act having been passed to fix the time to which the valuation should have reference, in consequence of the decision of the Supreme Court of the United States, in the case of *Greely v. Thompson et al.*, 10 Howard, 225.

Each of these acts, after directing the value of the article, in the markets of the country of exportation, to be ascertained, further says: "And to such value or price shall be added all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates."

The plaintiffs maintain, that the purpose of Congress was to have the value of the article, when ready to go into consumption here, ascertained; that, for this purpose, there was to be added to its cost or value abroad the expenses of procuring and bringing it here; that if, from the nature

and general course of the trade, a charge for commissions is not usually, in fact, incurred, then such a charge does not usually enter into, or constitute a part of, the value of the articles when ready for consumption here; and, therefore, to include a commission in such cases would be merely arbitrary, and not in accordance with the object in view, which was to ascertain the actual and true value. And it is argued, that the language of the Act admits of an interpretation to this effect; not that in every case a commission was to be added, but that it should be added only in those cases in which it was usual to pay a commission; and in every case, when added, it should be at the usual rates.

It must be admitted, that this is not the natural meaning of the words of the law. A direction to include, in every case, a charge for commissions at the usual rates, is certainly not complied with if such a charge is omitted in any case. The words, "in every case," apply to the act of including a commission, as well as to the rate of that commission. It is necessary to find sufficient reasons for the rejection of this natural and obvious meaning of the language of Congress, and the adoption of a different and more restricted rule; and it is not a sufficient reason that the Court does not perceive the propriety or practical expediency of the rule as expressed in a revenue law. A striking illustration of this may be seen in a recent case in the Supreme Court of the United States.¹ The Act of March 2, 1799, section 59, (1 Stat. at Large, 672,) had directed an allowance of two per cent. to be made for leakage of liquors in casks, paying a specific duty by the gallon. The Tariff Act of 1846 had repealed the specific, and substituted *ad valorem* duties on all liquors. No rea-

¹ Lawrence v. Caswell, 13 Howard, 488.

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son could be given why the allowance should be made in the one case and not in the other. But the Court held, that the deduction could not be made, although the effect was to include in the valuation what, owing to the usual leakage, would not go into consumption in this country.

It is true, that to add a charge for commissions in all cases, including those in which it is not usual to pay such a charge, may be said to be in some sense arbitrary. But an examination of the legislation of Congress on this subject, will show that this objection is not entitled to much weight. The Act of the 2d of March, 1799, section 61, (1 Stat. at Large, 673,) first prescribed a rule for fixing the valuation of merchandise for the assessment of *ad valorem* duties. It required the value to be estimated by adding twenty per cent. to the actual cost thereof, if imported from the Cape of Good Hope, or from any place beyond the same, and ten per cent. on the actual cost thereof if imported from any other place or country, including all charges, commissions, outside packages and insurance only excepted.

I am not aware what the practice under this law was, and its meaning is not very plain; but it was made plain by the Act of March 3d, 1817, (3 Stat. at Large, 369,) which enacted, that in all cases where an *ad valorem* duty shall be charged, it shall be calculated on the net cost of the article at the place whence imported, (exclusive of packages, commissions, charges of transportation, export duty, and all other charges,) with the usual addition established by law, of twenty per cent. on all merchandise imported from places beyond the Cape of Good Hope, and of ten per cent. on articles imported from all other places. The acts of April 20, 1818, section 4, (3 Stat. at Large, 434,) and March 1, 1823, section 5, (3 Stat. at Large, 722,) while they continued to require twenty or ten per cent. to

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be added to the cost, also required the charges to be included ; but the first of these laws expressly excepted commissions, while the last included them among the charges to be added. The Act of July 14, 1832, sections 4, 15, (4 Stat. at Large, 590, 593,) repealed the addition of twenty or ten per cent., but required that there should be added to the cost, or appraised value, "all charges except insurance."

And, finally, the laws now in question direct that in every case a charge for commissions shall be included among the charges to be added to the valuation or cost.

It thus appears that, in prescribing the rules by which the valuation should be made, or the cost ascertained, Congress has not attempted to reach the precise cost or value in each case, or even each class of cases. That sometimes a round sum, twenty or ten per cent., has been added to the cost abroad, to cover all charges and expenses of procuring the article, and bringing it here ; sometimes this addition has been taken to cover a part only of these charges and expenses ; sometimes commissions have been directed in all cases to be excluded, and sometimes to be in all cases included ; the apparent purpose, in reference to these smaller items constituting part of the value here, being, to prescribe some convenient general rule which would operate fairly in general, but not to endeavor to conform it even to classes of cases of importations of some particular articles, which are procured so as to form exceptions to the general course of trade.

It is true, that if commissions were never paid for the purchase of merchandise of this kind, there might be difficulty in complying with the direction contained in the act, which requires the commissions to be at the usual rate. If there were no usual rate of commissions for the purchase of crockery ware in England, it might then be necessary to

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ascertain whether commissions were paid for the purchase of such or similar ware imported hither from countries other than England; but I do not understand this to be necessary upon the evidence now before the Court, because, although the evidence strongly tends to prove that it is not usual for the dealers to pay a commission, it also tends to prove that commissions are sometimes paid, and that, when paid, the known and usual rate is two and a half per cent. I shall therefore instruct the jury :

1. That the Acts of Congress required the addition of a commission in all these cases to the invoice cost, although they should find that the plaintiffs, in fact, paid no commission, and that it is not customary for the importers of crockery ware from England into this country to pay a commission.

2. That the rate of commission, added in these cases, being that prescribed by the Secretary of the Treasury as usual, it is incumbent on the plaintiffs to show that it is higher than the rate usually paid, when any commission is paid, otherwise their verdict must be for the defendant.

It remains to consider the objection taken to the protest. The Act of February 26th, 1845, requires the person paying duties, as a preliminary requisite to the maintenance of an action to recover them back, to sign a protest in writing, "setting forth distinctly and specifically the grounds of objection to the payment thereof."

The law having confided to the Secretary of the Treasury the power to determine, in the first instance, what sums shall be exacted as duties, but having also secured to the citizen a right of appeal to the judicial tribunals from his decision, this act of Congress has required the importer, before making the payment, to specify, in writing, the grounds of his objection; and it follows, that when his appeal comes to be heard by the courts, he must be con-

fined to such grounds of objection to the payment as his protest contains.

Now these protests contain only one ground, namely, that the plaintiffs "pay no such commissions," as are added. There is certainly a great want of distinctness in this specification. It may mean that they pay less commissions than are added, or that they pay none. Giving to it the most liberal interpretation, and the broadest popular meaning, which, perhaps, under this Act of Congress, requiring the protest to set forth distinctly and specifically the grounds of objection, I should hardly be warranted in doing, still it amounts only to this, that the plaintiffs do not pay commissions. It does not set forth the ground of objection to the payment taken at the bar, that commissions are not usually paid in this trade of importing crockery ware from England, nor that there is no usual rate of commission, nor that two and one half per cent. is not the usual rate of commission.

It has not been attempted to maintain that the payment was illegally exacted, merely because the plaintiffs paid no commissions. Yet this is the only ground of objection set forth in the protest; and for this reason I must instruct the jury that the action cannot be maintained.

The plaintiffs elected to have a nonsuit entered.

S. Bartlett, and *S. Bartlett, Jr.*, for plaintiffs.

George Lunt, *District Attorney*, for the defendant.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

RHODE ISLAND DISTRICT, JUNE TERM, 1852.

BEFORE { Hon. BENJAMIN B. CURTIS, Associate Justice of the Su-
preme Court.
Hon. JOHN PITMAN, District Judge.

RUSSELL W. ALLEN *et ux.* vs. MARY E. SIMONS *et al.*

An executor, or administrator, is a necessary party to a bill to enforce a trust concerning property of the deceased.

An agreement among distributees, that no administration shall be taken, and that one of them, who was the apparent owner of the property at the death of the intestate, should continue to hold and manage it for the joint benefit of all, the intestate being much indebted at the time of his decease, cannot be enforced in equity.

THE opinion of the Court contains a full statement of the case.

CURTIS, J. This is a bill in equity, wherein Russell W. Allen, and Agatha G., his wife, state, that she is one of the children and heirs at law of William Simons, late of the city of Providence, deceased, intestate; that at the time of his decease the intestate was lawfully possessed of, and well entitled to, certain personal property, consisting

of a newspaper establishment, together with the good-will of the newspaper called the Republican Herald; that since the 27th day of June, 1829, the apparent title to the property in question had stood in the name of William Simons, Jr., the eldest son of the deceased, and the business of the newspaper had also been conducted in his name; but that, in point of fact, he held the property, and transacted the business, during the lifetime of his father, only as an agent, or trustee; that William Simons died intestate, on the 6th of March, 1845, and thereupon William junior, and the other children of the deceased, agreed that the establishment should be conducted as before; and it was so conducted until the death of William junior, in 1849. The bill makes the widow and administrator of William junior parties, and also joins as defendants the three other children of William senior, and prays that the documents, whereby title was conveyed, or pretended to be conveyed, to William junior by his father, may be cancelled; that an account may be taken of the property of William senior, and of the profits of the business while conducted by, or in the name of William junior; that it may be declared that the complainant, Agatha, as one of the children and heirs at law of William senior, is justly entitled to her share of the property and proceeds, according to the statute of distributions of Rhode Island; that a commission of partition may issue to divide the property into five equal parts, and that one of those parts may be allotted to the complainants, and for further or other relief.

The answers of the widow and the administrator of William junior deny the title of the complainants, and of William senior, and assert that William junior held and owned all the property which was in his possession at his decease in his own right, and not as a trustee, and that the business, conducted in his name, was on his own account

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solely. The answers of the other four children of William senior confess the substance of the bill, but no decree is sought against them, it not being alleged that either of them is in possession of any property of which an account is asked.

This statement of the outline of the bill and answers presents the nature of the title made by the complainants. Many allegations are inserted in the bill in support of this title, which are denied by the answers of the widow and administrator of William junior, and much evidence has been taken in reference to these contested facts. The subject in controversy is personal estate.

Whatever may have been the interest of William Simons senior in this property, his children did not acquire that interest by his decease. The rule of the common law laid down by Lord Coke, (Co. Lit. 8 a,) that a man, by the common law, cannot be heir to goods or chattels, for *haeres dicitur ab haereditate*, is in force in Rhode Island, and upon the decease of any one having personal estate, his children do not become its owners. They acquire only that qualified equitable right to distributive shares of what shall remain after payment of the just debts and funeral charges of the deceased, and the expenses of settling his estate, which is conferred upon them by the statute of distributions. Public Laws, p. 239. This qualified equitable right can only be worked out through a settlement of the estate by an administrator, appointed according to the laws of the State, who alone has the title to personality cast on him by those laws, and who alone is competent to sue, either at law or in equity, to reduce the personal property and rights of the intestate to possession. It is true that, after an administrator has been appointed, if he colludes with a debtor to the estate, a Court of Equity will allow a distributee, having an interest in the estate, to sue

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the administrator and the debtor, and compel the latter to pay the debt. Calvert on Parties, 157. But these, and similar cases of collusion, do not trench at all on the general rule that the executor, or administrator, being entitled to the personal estate, is the proper party to sue. *Jones v. Goodchild*, 3 P. Will. 34. In these cases of collusion, the purpose of the suit is to bring the executor, or administrator, and the debtor before the Court, and cause the former to assert his title, and thus do his duty as a trustee. And I believe we should look in vain for a case, in which a child of an intestate has been allowed, either at law or in equity, to sustain a suit in the character of heir, or distributee, to recover personal estate of the deceased.

The complainants' counsel has endeavored to overcome this difficulty by the argument that at the decease of William Simons senior, there was a mutual agreement among all his children, that no administration should be taken on his estate, that the property should remain undivided, and that the newspaper should continue to be published for the joint benefit of all the children, and that this constituted William Simons junior a trustee for the others, and so his representatives are estopped to deny the title of the complainant, and this Court will decree the execution of the trust. This ground requires a careful examination. It must be observed that the bill asserts the title of William senior, and claims that his children, at his decease, became entitled to this property; that it was then in the possession of William junior, and ostensibly his; that the effect of the agreement with him was, to allow the property to continue in his possession, as if he were its owner, instead of going into the hands of an administrator.

If it were true that the children of William senior, at his decease, became justly entitled to this property, and that only some legal formality was necessary to clothe them

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effectually with the title, a mutual agreement to dispense with that formality would be enforced, and a Court of Equity would not allow a party to the agreement, in possession by virtue of it, to set up the want of that legal formality as a bar. His conscience would be bound by the agreement, and the title would be treated substantially as it would have been treated if the legal formality had been complied with.

But these complainants do not show themselves justly entitled to any particular part of this property. As has already been stated, the title of a distributee, under the laws of Rhode Island, is only to such surplus as shall remain after the payment of all just debts and charges.

Creditors have the first and best right to the whole extent of their just debts; *non constat*, therefore, that either of the parties to this agreement would be justly entitled to any thing from this estate, if it had gone into the hands of an administrator; and to hold that the agreement should itself make a title, would put the complainants in a very different situation from what they would have been in if administration had been taken; for it would enable them to call for an account of the property, and take one fifth of the whole to their own use, when they were equitably entitled only to one fifth of what might remain after paying all just debts and charges.

It is clear, also, that the whole of this property, if it belonged to William Simons senior, now stands charged with his debts. The statute of Rhode Island, concerning the settlement of intestate estates, (Public Laws, 239, section 2,) contains an express provision: "When any person shall die possessed of any chattels, or personal estate, the same shall stand chargeable with the payment of all the just debts and funeral charges of the deceased, and the expenses of settling his estate." This charge is one which the agreement among the children, now in question, can-

not in any way affect. And I apprehend it is not consistent with the principles upon which a Court of Equity proceeds, to decree an account among distributees of the property of the deceased, before an administrator has been appointed to represent creditors, when the bill shows that the deceased was indebted, and by law the property is charged with those debts, whatever agreement the distributees may have made among themselves. I am not aware that such a bill was ever maintained, and the reasons against it are very strong. In the first place, the distributees have no right whatever to intermeddle with the personal property of the deceased, for any other purpose than to do such acts as may be necessary to preserve it, until an administrator can be appointed. Any other acts of control, by any person, constitute him an executor *de son tort*, and subject him, as a penalty, to the payment of the debts of the deceased. When, therefore, this bill shows that the children of William Simons senior, instead of subjecting this property to the payment of his just debts, in a due course of administration, made an agreement that no administration should be taken, that they would wholly disregard the rights of creditors, and treat the property as their own, it shows an agreement which a Court of Equity cannot enforce. It is not based on any equitable right of the parties; it is a violation of the common law; it tends to defraud creditors; it is plainly forbidden by public policy; and is inconsistent with that system of statute law providing for the just and orderly settlement of intestate estates, which has been enacted by the legislature.

It is said by Lord Redesdale, (Eq. Pl. 164,) that "it is the constant aim of a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the Court perfectly safe to those who

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are compelled to obey it, and to prevent future litigation." From this principle most of the rules, concerning parties to suits in equity, spring; and it imperatively demands that an administrator of William Simons senior, as the representative of his creditors, should be a party to this bill. The property in question stands charged with all his just debts. An account and distribution which should disregard this charge would scatter the property into different hands, and thus endanger the rights of creditors, and render it more difficult to enforce them; it would increase litigation; it would take from the possession of William junior's representatives four fifths of the property, without rendering it safe, as against the creditors of William senior, for them to part with that possession; and it would give to each of the children one fifth of the whole property, when their only equitable claim is to one fifth of what may remain after payment of all just debts.

It is urged that it does not appear there are any just debts due from the estate of William senior. But the bill shows that for many years before his death he was greatly embarrassed by debts; that this property was originally placed in the name of his son, "for the sole and only purpose of enabling him to carry on and conduct the business of said establishment, and to publish the said Herald without being subjected to legal process, arising from any liabilities to which he then was, or might become liable, as former partner of the greatly insolvent firm of Jones & Simons;" and no reason, other than his apprehension of legal process by creditors, is suggested, why the property was continued and the business transacted in the name of William Simons junior, down to the time of his father's decease.

Upon these allegations in the bill, it is impossible for the Court to assume there are no creditors to be protected.

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It is true no one of them has taken administration. But this may be because they are ignorant that William senior owned any property, or because they have become satisfied that this property justly belonged to William junior, and that any attempt to disturb his title would be fruitless, or for other reasons, which do not appear. The Court cannot, in their absence, act as if they had no rights, or, in face of every reasonable presumption, presume they do not exist.

The complainants' counsel also relies on an agreement, made on the first day of February, 1849, between Aaron Simons and Charles F. Tillinghast, as the administrator of William Simons junior, as dispensing with the necessity of making an administrator of William senior a party. But I find nothing in that agreement which can affect the title of any party to this property. Its purpose was to provide temporarily for the custody and management of the property until the title could be settled, and not to create any new title, or waive any objection to the claims asserted by either party, and I find no language in the instrument inconsistent with this leading purpose, or which can properly aid the complainants in making out their case.

There is, however, one mode in which the complainants may place themselves in a position to obtain whatever may be their just rights in this property. Mr. Allen, in right of his wife, can apply for, and I presume obtain, letters of administration on the estate of William Simons senior, and, by a supplemental bill, bring before the Court this new title, with proper prayers for relief. I am disposed to grant leave to file such supplemental bill, because I think it just that the expense already incurred in this cause should not be fruitless, and because the evidence already in the cause has been taken by and between the same persons, and upon the same contested facts and in support

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and denial of the same titles which will be then before the Court.

But to prevent misapprehension it is necessary for me to state, that I have not thought it proper, in the absence of a necessary party, to examine the merits of this controversy, nor to ascertain whether, if the property was held by William Simons junior, upon a secret trust, it was a trust created for the purpose of defrauding or delaying creditors. In determining whether to take administration, and file a supplemental bill, the complainants must be governed by their own views, and those of their legal advisers, and not by the assumption that the Court has formed any opinion respecting the trust asserted in the bill.

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AND CALENDERING COMPANY.

A factor who accepts a bill, drawn against a particular consignment of merchandise, which has been so far executed as to be placed in the hands of a third person, to be delivered to him, acquires thereby a property in the goods, which will enable him to maintain replevin against an attaching creditor of the consignor, to whom the officer making the attachment had delivered the goods.

No bill of lading, or other formal document, is necessary to create the title in such case, nor is it necessary that the depositary should have been originally employed by the consignee, nor that he should know the particulars of the consignee's title.

THIS was an action of replevin, for a quantity of cotton cloth.

It appeared that Daggett & Co., manufacturers, at Attleborough, in the State of Massachusetts, who had been in the habit of employing the plaintiffs as their factors in the city of New York, wrote to them on the 4th of February,

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1852, that they had that day delivered 500 pieces of cloth to the defendants, to be colored into cambrics, and had directed them to insure the goods, and send the plaintiffs a policy, with a receipt for the goods, and requesting the plaintiffs to accept a bill which they had drawn on them at six months date. They also desired the plaintiffs to order the colors of the cloths. On the same day, Daggett & Co. wrote to the defendants, at Providence, R. I., advising them of the despatch to them, by railroad, of 300 pieces of cloth, to be made by the defendants into cambrics for the plaintiffs, and to be forwarded to the plaintiffs when finished. They added, that they should send 200 pieces more on that day, and desired the defendants to send to the plaintiffs that afternoon a receipt for 500 pieces, together with evidence that they were insured for the plaintiffs' account; and they informed the defendants that the plaintiffs would order the colors. On the 5th of February the defendants wrote to the plaintiffs that they had received 500 pieces of cloth from Daggett & Co. to color, &c., for cambrics, and had, at their request, effected insurance thereon, payable, in case of loss, to the plaintiffs; and they applied for and obtained this insurance "for and on account of the plaintiffs, loss, if any, to be paid to them." On the 6th of February, the plaintiffs wrote to Daggett & Co., acknowledging the receipt of their letter of the 4th of February, and saying, they suppose the cloths are of the same quality as others they have sold, and if so, they will accept the draft; and on the same day they wrote to the defendants, acknowledging the receipt of their letter of the 5th of February, and ordering the colors and mode of packing the cambrics. On the 13th of February, the bill was presented to the plaintiffs for acceptance, and was by them accepted, it having been previously negotiated by Daggett & Co. On the 10th of March, Daggett & Co.

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having failed in business, the defendants caused these goods to be attached, as security for a debt which Daggett & Co. owed them; the goods were not then completely finished, and the attaching officer delivered them to the defendants.

It was agreed that upon these facts the Court should determine whether the plaintiffs can maintain their action.

The opinion of the Court was delivered by

CURTIS, J. The question is whether the plaintiffs, at the time the attachment was made, had a property in these goods, which would enable them to maintain replevin, against one holding them under an attachment as the property of Daggett & Co.

The facts show that the parties intended to vest in the plaintiffs an interest in these goods, as security for the reimbursement of the money, which, by their acceptance they engaged to pay, for Daggett & Co. Independently of any particular expressions occurring in the correspondence, such an intention is fairly inferable from the very nature of the transaction. A request made by a principal to a factor to accept a bill, because the principal has placed merchandise in the hands of a third person, to be insured for the benefit of the factor, and forwarded to him for sale, carries with it an implication that the parties intend that the factor, if he accepts, may look to the goods for his reimbursement; and if this implication is not controlled, it is sufficient, so far as the mere intention of the parties can govern, to confer on the factor a corresponding interest in the goods. In the case at bar, this intent, derivable from the nature of the transaction, is not controlled, but is much strengthened by the language of the correspondence. When Daggett & Co. sent the cloths to the defendants, they informed them that they were to be made into cam-

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bricks for the plaintiffs, and forwarded to them; that they were to be insured for the plaintiffs' account, and they requested the defendants to send to the plaintiffs evidence that the goods had been thus received and insured. This was accordingly done, and the bill was accepted because it was done. Now, although it is clear that a mere intent of a consignor to vest a special property in his factor, to secure him for an advance on account of a particular consignment, even if the advance is made on the faith of it, will not create any legal property in the factor, yet it is otherwise when the particular goods have been set apart, in the hands of a third person, who has undertaken to deliver them to the consignee, and the latter has advanced, or accepted, upon the faith of such an arrangement. The decisions of the Supreme Court of the United States, in *Gibson v. Stevens*, 8 Howard, 384, and *Grove v. Gilmor*, 8 Howard, 429, and of the Court of Exchequer, in *Bryans v. Nix*, 4 Mee. & Wels. 775, and of the Supreme Court of New York, in *Holbrook v. Wight*, 24 Wend. 169, *Grosvenor v. Phillips*, 2 Hill, 147, fully support this position, as does also *Sumner v. Hamlet*, 12 Pick. 76.

It was attempted to distinguish some of these cases from the one now under consideration, because the parties had both agreed that the depositary should act as the plaintiffs' agent; but I consider that in this case, although Daggett & Co. originally employed the defendants, and were to pay them for finishing the goods, yet when the plaintiffs were apprised that the defendants held the goods for them and assented thereto, and when the defendants were informed that the goods were to be finished for and sent to the plaintiffs, and by accepting the goods for these purposes gave their assent to execute them, all parties, including the defendants, agreed that the defendants should act as the

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plaintiffs' agents so far as respected the custody for, and delivery to, the plaintiffs of these goods.

It is true the defendants did not know why the goods were to be delivered to the plaintiffs. The information given to them by Daggett & Co., when the goods were sent, that they were to be finished for and sent to the plaintiffs, and insured for their account, would rather indicate that the plaintiffs were the absolute purchasers. But this is not material. It is not necessary that they should know the inducement which led to the arrangement, or the particulars of the plaintiffs' title. They knew what they had themselves agreed to do, which was in effect to hold the goods for the plaintiffs, and this was sufficient. I know of no principle, or decision, which requires more ; and in none of the cases referred to above, except the one in 12 Pickering, was notice to the depository of the nature of the title of the creditor, an element in the decision. If the depository undertakes to act for a third person, and receives the property under such an undertaking, he must execute it, unless prevented by process of law founded on a superior title, and it is not for him to say he did not know that the person for whom he held the goods had a good title.

This would be otherwise, if notice to the depository were a necessary element in the title of the consignee ; but it is not. That title rests upon the intent of the parties to create and vest a property in the goods, upon the valuable consideration parted with by the factor on the faith of that property, and upon the execution of that intent by setting apart the particular goods in the hands of a third person, to hold for the factor, thus placing them out of the control of the general owner, and within the control of the factor, so that he can exercise and have the benefit of his ownership. And, therefore, I am of opinion that the cases in which it has been held that a delivery to

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a carrier under a bill of lading, consigning the goods to a factor who has accepted on account of them, vests a property in the factor, are all authorities in favor of the plaintiffs; for they do not depend upon any particular efficacy of a bill of lading, any further than that document manifests the intent of the parties to have the carrier hold the property for and deliver it to the factor. *Gibson v. Stevens*, and *Grove v. Gilmor*; *Haile v. Smith*, 1 B. & P. 564; *Anderson v. Clarke*, 2 Bing. 20; *Desha et al. v. Pope*, 6 Alabama R. 690.

That the right of a factor to a lien cannot rest on a bill of lading alone, is clear, from *Patten v. Thompson*, 5 M. & S. 350; and in *Bryans v. Nix*, 4 M. & W. 791, Mr. Baron Parke declares, in terms, what that case required, that there is no difference as respects this question, between a bill of lading and any other competent evidence of the purpose and acts of the parties. *Gibson v. Stevens* rests on the same ground.

Perhaps some confusion exists, from confounding the property acquired by such an arrangement as was made in this case, with the lien of a factor. It is correctly said, that actual possession by the factor is necessary to his lien; and when the goods have been placed in the hands of a depositary employed by the owner, to be delivered afterwards into the actual possession of the factor, it can hardly be said that the latter has actual possession of the goods, and so, it is argued, he cannot have a lien as factor. But the property acquired by depositing the goods in the hands of a third person, under an agreement that they shall be delivered to one who has advanced money or negotiable paper on account of them, and shall be by him sold, is something more than a lien. The legal title to the property may be considered as passing to him for the purposes indicated by the agreement. Such is the view taken by

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Eyre, C. J., in the leading case of *Haile v. Smith*, and I perceive no sound reason for doubting its correctness. It relieves transactions of this nature from all difficulty arising from the want of actual possession by the factor, and places them upon the same footing as absolute sales to *bonâ fide* purchasers, so far as respects the vesting of the title intended to be created. And in *Gibson v. Stevens* the Court held that, as respects the legal title, there is no distinction between the person who has made advances and taken security on the goods, and the case of an actual purchaser. In my judgment, this result is in accordance with the interests of trade, and with the usages of commerce, and allows only a just and safe effect to the agreements of parties.

My opinion is, that the plaintiffs had a property in these goods on which the action of replevin may be sustained and the judgment must be in their favor.

Judgment for plaintiffs.

Cozens, for Plaintiff.

Carpenter & Hoppin, for Defendants.

HAWES *et al.* vs. HENRY MARCHANT *et al.*

A valid promise not to arrest a debtor on the first execution does not, at law, avoid a bond given by the debtor for the prison liberties, when arrested in violation of such promise, which is collateral merely.

A statutory bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties.

But if the debtor, with the knowledge and consent of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity.

THIS is an action of debt on a bond for the prison limits. Among other pleas the defendants have pleaded, that before Marchant, the debtor and principal obligor, was

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committed to jail on the execution of the plaintiffs, they promised that if he would deliver to them a negotiable promissory note, for the sum of five hundred dollars, indorsed by a third person, they would not have his body taken on that particular execution; and that afterwards, and before he was committed to jail, he tendered to the plaintiffs the note agreed on, and they refused to accept the same. To this plea the plaintiffs demurred, and the demurrer having been argued, the opinion of the Court was delivered by

CURTIS, J. This plea shows a promise, for a valuable consideration, not to commit the debtor to jail on this particular execution, which, according to the law of Rhode Island, was returnable at the end of six months from its teste, and upon its return unsatisfied, the creditor would be entitled to take an *alias* execution, to which the promise in question did not extend. In other words, the plea shows a valid promise, by the creditors, not to take the body of the debtor in execution until after the lapse of six months from the teste of the execution issuing on the judgment.

Two questions arise. The first is whether this promise operates to suspend the legal right of the creditors, so as to render its exercise a trespass, and to make the imprisonment of the debtor, on the execution, duress. And the second is, whether, if the imprisonment was thus illegal, the bond was void.

Upon the first of these questions I am of opinion that the promise of the creditors was merely a collateral engagement, which had no effect whatever upon the execution, or upon any right, or power, which by law arose from it. The case is analogous to those which have been decided upon covenants not to sue for a limited time. Such covenants are held not to affect the right, but to be colla-

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teral and independent, because, among other reasons, the damages for the breach of such covenants are not necessarily coextensive with the value of the right agreed to be suspended. The same is true here. There is no necessary connection between the damages suffered by Marchant in the exercise of the plaintiffs' right to imprison him during the six months, and the value to the plaintiffs of that right.

Moreover, the only ground on which a court of law ever holds that a collateral promise operates directly on a legal right, is to avoid circuity of action. For this reason, a covenant not to sue at any time, or in any court, may be pleaded as a bar. But no circuity of action would be avoided by allowing this promise to operate upon the right according to its terms. Marchant would still be able to sue for its violation, and recover such damages as he might show himself entitled to. Courts of law cannot, like courts of equity, compel the specific execution of these collateral promises. They can only adjudge damages, and where these are not necessarily coextensive with the value of the right enforced in violation of the promise, they must leave the parties to their separate actions in which their respective rights will be enforced, and thus, at last, complete justice will be done. It is otherwise in courts of equity, and in those classes of cases in which courts of law exercise a summary equitable jurisdiction, as in the discharge of bail and some few other instances. But this case comes within no such equitable jurisdiction of a court of law, and the action must be tried, and judgment rendered, upon the principles of the common law, according to which, a promise to suspend, for a limited time, the exercise of a legal right, cannot be pleaded as a bar, because it does not operate upon the right itself, but is merely collateral and executory, and though valid and binding, is to be enforced like other promises, by an action founded upon

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it, in which damages are recoverable, corresponding with the injury sustained by the breach of the promise.

After this plea had been decided to be bad, the case went to trial upon other issues, and the facts and questions on that trial appear in the opinion of the Court.

CURTIS, J. The obligation declared on is a statutory bond. The officer by whom, and the occasion on which, it might be taken, the obligee, the precise condition, and the damages for its breach, are all prescribed by the Statute of Rhode Island, entitled "An Act for the Relief of Poor Persons Imprisoned for Debt." (Digest, 166.)

It is to be governed by the laws applicable to such obligations, among which is the rule, that if a public officer, authorized, to take a bond, has illegally exerted his official authority, and thereby compelled the obligee to enter into an obligation not required by law, it is not binding. This rule is settled by the highest authority.

In *United States v. Tingey*, 5 Peters, 115, the defendant, who was a surety of a purser in the navy, in a joint and several bond, pleaded that the condition of the bond differed substantially from the requirement of the act of Congress, and that the same was extorted from the purser and his sureties as the condition of his retaining his office. The Court held the plea good. In conformity with this are a great number of decisions, some of which are, *United States v. Gordon*, 7 Cranch, 287; *United States v. —*, 1 Brocken. 195; *United States v. Gordon et al.* 1 Brocken. 190; *United States v. Morgan*, 3 Wash. 110; *Beacom v. Holmes*, 13 S. & R. 190; *Purple v. Purple*, 5 Pick. 226. And the cases in which it has been held that, if the condition of a statutory bond contains stipulations which are not required by the Statute, but separable from those which are required, the latter may be enforced and the former rejected,—silently, at least, acknowledge the same rule,

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by requiring that the one should be separable from the other, and by denying all efficacy to those provisions which have been inserted without warrant of law. Among this latter class of cases are *United States v. Bradley*, 10 Pet. 343; *United States v. Linn*, 15 Pet. 315; *Hall v. Cushing*, 9 Pick. 395; *Van Deusen et al. v. Hayward*, 17 Wend. 67; *Ring et al. v. Gibbs et al.*, 26 Wend. 502; *Shunk v. Millar*, 5 Barr, 250.

The rule which avoids such bonds rests upon the want of authority in the public officer to take them, and upon the policy of guarding the citizen against oppression by the illegal exercise of official power. It is well stated by Sewall, J., in *Churchill v. Perkins*, 5 Mass. R. 541, that where the plaintiff demands the fruit of an obligation obtained *colore officii*, it must be shown that the demand is justified by some authority of the office, otherwise it is against sound policy, and is void by the principles of the common law. By *colore officii*, however, must be understood some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given. If all parties voluntarily consent to enter into the bond, and the departure from the precise requisitions of the statute is made by mistake, or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid, simply because it contains something which the statute does not authorize. *United States v. Bradley*, 10 Peters, 364; *United States v. Linn et al.*, 15 Peters, 290. Whether it can be enforced or not, depends upon the possibility of separating the part of the condition authorized and required, from the residue of the condition, where the condition is not wholly in conformity with the law, and that is the only objection to the bond.

Such being the rules of law, upon all the facts, if shown, there can be no doubt this bond was invalid. Mar-

chant, having given bond with sureties in the form prescribed by the statute, that bond having been accepted by the keeper of the jail, and Marchant having been thereupon permitted to go out of the close jail, and to be and remain upon the enlarged limits, and enjoy, what is established by law to be the liberty of the yard, he had a right to continue to enjoy that liberty until the expiration of thirty days, the period prescribed by the statute; and any interference with that right by the keeper of the jail was unlawful. While in the possession of this right he was induced to enter the close jail, by a request of the keeper, that he would return thither for the purpose of seeing one of the sureties on the official bond of the keeper, who was not satisfied of the sufficiency of the sureties on Marchant's bond; he was there detained in close custody, and denied the liberty of the yard, except upon the condition of furnishing another bond, with sureties satisfactory to the keeper, and, as the jury have found, the bond now in suit was executed by means of the duress thus exercised upon Marchant, the principal obligor. To this case the language of the Court in *United States v. Tingey*, 5 Peters, 129, is exactly applicable: "There is no pretence to say that it was a bond voluntarily given, or that, though different from the form prescribed by statute, it was received and executed without objection. It was demanded of the party, and extorted under color of office, against the requisition of the statute."

In this case the bond was extorted against the requisition of the statute, for that conferred on Marchant, after the first bond was accepted, a right to the liberty of the yard, and made his subsequent detention in close jail illegal, and required the jailer not thus to detain him; and consequently the exaction of the second bond was contrary to the statute. A very able argument has been addressed to

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the Court to prove that the creditors, the statute obligees, who did not in any way participate in this illegal exertion of authority by the officer, ought not to be affected thereby. It is said the jailer who takes the bond is a public officer, not appointed by the creditors, not in any just sense their agent, and that they ought not to be made responsible for his acts. This must be admitted. But there is a wide difference between being responsible for the unlawful act of another, and enjoying the fruit of his unlawful act. The former the law does not impose upon any one who has not, in some way, authorized the act, or voluntarily placed himself in a position to answer for it; but neither does it allow a third party to obtain the benefit of an unlawful act, simply by showing his own innocence and freedom from responsibility. The creditor can have no right of action in this case, save through the act of the jailer in taking this bond. It is true, the appointment of the jailer was an act of the law and not of the party; but the party can have no right in this bond, save through his act as a public officer, done in the lawful exercise of the powers confided to him; and having exceeded those powers, and compelled the execution of the bond by means of such excess, his act can confer no right on any one.

The view which has been taken renders it unnecessary to consider the question whether simple duress at the common law, operating only on the principal, can be taken advantage of by the sureties. The case of *Huscombe v. Standing*, Cro. Jac. 187, is certainly in point, and it has often been assumed to be good law. I am not prepared to say it is not so, though it must be admitted that it may lead to strange consequences, in a case where the surety pays the bond, and comes back on the principal to indemnify him, and thus the latter is effectually held for a debt, which, according to the case in Cro. Jac., does not appear

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to have been justly due, and which he was forced, by duress, to render himself liable for to the surety, who, at his request, enters into the obligation. But it is not necessary for me either to adopt or reject that decision. That was not a statutory bond, and the defence was only duress at the common law. Here the defence is as available to the surety as the principal, for it was by an illegal exercise of official authority that their signatures were taken and obtained. So it was held in *United States v. Tingey*, which was an action against a surety, and the same is true of *Churchill v. Perkins et al.*, and *Beacom v. Holmes et al.* See, also, *Thompson v. Lockwood*, 15 Johns. 256. But though upon the facts above referred to, this bond must be deemed to have been invalid, it remains to consider whether this defence is open to all these defendants.

It appears that after the second bond was given, Burgess, one of the sureties on both bonds, called on the attorney of the execution creditors, and inquired if he was satisfied with the sureties on the second bond, and being informed that he was, said he would surrender Marchant on the first bond; he also said if the attorney was not satisfied with the second bond he would surrender Marchant on that. Soon after, he went to the jail, accompanied by Marchant, and surrendered him to the deputy-keeper, the jailer not being present. He was asked on which bond he wished to surrender him, and replied on the first bond. The deputy made the proper entry on the records, and thereupon Marchant and Burgess left the jail. It was admitted, at the argument, that, for some days after this, Marchant continued on the limits; but, being advised that the second bond was void, he left them, and has since been at large.

The Statute of Rhode Island grants to a debtor, imprisoned on execution, the privilege of the enlarged limits

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of the prison, "such prisoner first leaving with such sheriff, or keeper of the jail, a bond to the creditor, with two or more sufficient sureties," &c. When, therefore, Marchant, after his surrender upon the first bond, left the close jail, and went upon the enlarged limits, he claimed and exercised a privilege which could rest only upon the previous execution of a valid bond, pursuant to the statute; for the existence of such a bond was a condition precedent to the existence and enjoyment of that privilege.

Further; it was the duty of the jailer and his deputy not to allow a debtor on execution, who had not given such a bond, to go upon the limits, and the violation of this duty renders the jailer liable to the creditor for an escape. When Marchant was permitted, by the deputy-jailer, to leave the close jail, he suffered him to do that which was lawful, only if the remaining bond was valid, and he subjected his principal to pay the debt, if a valid bond, conformable to the statute, was not then left with the jailer.

The question is, whether Marchant is estopped to deny the validity of the bond he left with the jailer. The law of estoppel by acts *in pais* has been greatly extended in modern times. Its operation is so just, that it commends itself to every fair mind; and it is sufficiently exact, certain, and safe, when kept within the limits of the principles upon which it depends. Those principles require that, to constitute such an estoppel, a party must have, designedly, made an admission inconsistent with the defence or claim which he proposes to set up, and that another party has, with his knowledge and consent, so acted on that admission, that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel.

The first inquiry, therefore, is whether Marchant has made an admission inconsistent with the defence he now

proposes to set up. It is clear that he has; for he has claimed, and proceeded to exercise a privilege, which he had a right to exercise if he had given a valid bond, but which it was unlawful for him to exercise if he had not; this privilege he claimed of, and received from, a public officer, whose duty was violated by the grant of the privilege if a valid bond was not left with the officer, but who was obliged to grant it if a valid bond was left.

His claim, therefore, was equivalent to an express affirmation that such a bond was left; for the officer was not called on to believe that he meant to commit an escape, or that he was doing any thing unlawful. The officer was warranted in the belief, and undoubtedly did believe, that what he was about to do was in the exercise of a legal right, founded on the existence of this bond, left with the jailer in compliance with the law; and this belief, being justly produced in his mind by the act of Marchant, it is the same as if a direct and positive affirmation had been made, in terms, by Marchant to the deputy-jailer, that he had executed a sufficient bond, according to law, to entitle himself to the liberty of the yard.

It is clear, also, that after the deputy-jailer had acted on this belief, it must operate to the injury of his principal and himself to allow Marchant to show that the bond was invalid. Indeed, the alternative is whether Marchant should be held liable on this bond, the damages for the breach of which are the judgment, debt, and interest; or whether the jailer shall be liable for the same debt, so that, if the estoppel exists, it is no more than coextensive with the injury which would be suffered by allowing the defence to prevail.

I have no doubt, also, that there is sufficient privity between the officer who takes the bond, and the creditors for whom it is taken, to have the estoppel enure to the benefit

of the latter. It has already been held, that though the officer is not properly an agent of the creditors, yet their title depends upon the validity of his acts, and that if he so conducted, that the bond was invalid as between him and the debtor, it was also invalid as between the debtor and creditor; and it is but an application of the same principle to hold, that if the bond has subsequently been made valid as between the officer and the debtor, the latter cannot make a defence to the bond; and it may be added that, to compel the officer to pay the debt by making a defence to the bond, would operate as a fraud on him, which is the basis of these estoppels *in pais*.

It remains to consider whether either of the sureties is bound by this estoppel, and I am of opinion that Burgess is thus bound. The deputy-jailer was present when Burgess inquired of the attorney of the creditors if he was satisfied with the sureties on the second bond; when he informed the attorney, that if he was not thus satisfied, he would surrender Marchant on the second bond; when he was informed by the attorney he was satisfied with the sureties on the second bond, and when Burgess said he should surrender the debtor on the first bond. Soon after this he did surrender him, to this officer, in the absence of the jailer, and he stood by, and saw Marchant leave the jail, and gave no notice that the act, which the deputy-jailer had a right to believe was done upon his responsibility as one of the sureties on the second bond, was not so done. I have no doubt he then considered himself responsible. He had just before spoken, in the presence of the deputy-jailer, of surrendering Marchant on the second bond; he could scarcely have intended to surrender him on a void bond; and the deputy-jailer might fairly have understood, from what he there said, that there were two valid bonds, upon one or the other of which he

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intended to surrender the debtor, probably to put an end to this double liability, according as the attorney was satisfied with the one or the other; and when he did in fact surrender him on the first, and stood by, and, without informing the deputy-jailer that he considered the second bond invalid, saw Marchant claim and take, and the deputy-jailer concede, a privilege which rested upon the validity of the second bond, I am of opinion he became estopped from denying its sufficiency. He was silent when he should have spoken; and he cannot now speak.

It might be otherwise, if this surety had not been upon both bonds, and had not had notice of the facts which rendered the second bond invalid; though in *Petrie v. Feeter*, 21 Wend. 172, a surety was held to be estopped by his representation to a person about to purchase a bond, from showing a payment made by the principal obligor. It is not necessary to go so far in this case, though I do not wish to be understood as questioning the correctness of that decision.

As to the remaining surety, I perceive no reason why he should be estopped; and the result is that under the agreement of the parties a verdict must be entered that the writing obligatory declared on, is the deed of Marchant and Burgess, and is not the deed of the remaining surety. And if, upon this verdict, the plaintiffs shall move to discontinue against the second surety and for judgment against the others, as they have given notice, I shall allow the motion upon the authority of *Minor et al. v. Mechanics' Bank of Alexandria*, 1 Peters, 46; *Amis v. Smith*, 16 Peters, 303; *United States v. Linn*, 1 Howard, 104; and a case which will be reported in 13 Howard, having been decided at the last term of the Supreme Court.*

* *Coffee v. Planters Bank of Tennessee*, 13 Howard, 183.

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SILAS BULLARD *et al.* vs. THE ROGER WILLIAMS INSURANCE COMPANY.

There is no presumption that defects, found to exist in the hull of a vessel during the voyage, were produced by a peril of the sea. The burden is on the assured to prove this.

A letter of abandonment must state the cause of the loss, and when stated, it must appear to have been a peril insured against.

If a vessel be so injured by a sea peril as not to be repairable, except at an expense exceeding its value when repaired, the loss is actually total, and no abandonment is necessary.

The valuation in the policy fixes the value of the vessel for this purpose under the form of policy used in Boston and some other places.

Seaworthiness of the hull is such a state of the hull, as is competent to resist the ordinary action of winds and waves in the voyage for which the vessel is insured.

Heavy cross seas are not the ordinary action of the sea, within the meaning of this rule, however common they may be in the voyage insured.

THIS was an action on a policy of marine insurance on the brig *Star*, at and from Fall River to Havana, and thence to a northern port in the United States. The vessel was valued in the policy at \$3,000, and was insured for \$2,000. It appeared that the vessel performed her outward voyage to Havana, took a cargo of molasses there, and sailed on her return voyage. Soon after leaving the harbor of Havana, she met the cross sea, which is ordinarily thrown up in the Florida Gulf, by the meeting of the trade wind and the gulf stream. She soon sprung a leak, which increased, and it became necessary to put away to Key West. The brig was there hove out and surveyed, and the report of the surveyors, which was supported by their depositions, taken under a commission and read at the trial, showed that the expense of repairing her would be \$2,000, and that when repaired the brig would not be

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worth the cost of her repairs ; and the surveyors having recommended a sale, she was sold by the master.

The plaintiffs claimed to recover as for a total loss. The points ruled, and the instructions given to the jury, appear in the charge of the Court by

CURTIS, J. The plaintiffs claim to recover from the defendants a sum of money alleged to be due under a policy of insurance. They show that at Key West this vessel needed certain repairs. It is incumbent on them to prove that these repairs were rendered necessary by some peril insured against in the policy. Even if you are satisfied, this vessel was seaworthy at the beginning of her voyage, there is no presumption that the necessity for these repairs was occasioned by a peril-insured against. The burden is still on the insured to prove that by some peril within the policy, the vessel received injuries requiring the expenditures shown by the surveyors' testimony. The perils insured against in this policy, so far as the present case is concerned, are "perils of the sea," and the inquiry is, whether the damage suffered by this vessel was from a peril of the sea. Damage done to a vessel by perils of the sea, includes every species of damage done to the vessel at sea, by the violent and immediate action of the winds, or waves, or both, as distinct from the ordinary wear and tear of the voyage, and as distinct from injuries suffered by the vessel, in consequence of her not being seaworthy at the outset of her voyage, or afterwards, under circumstances in which the master was guilty of negligence in not making her seaworthy.

In this case there is no pretence of any negligence by the master during the voyage, though there is a serious question, for your consideration, whether the vessel was seaworthy at the outset of the voyage. The law in refer-

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ence to this will be presently stated ; but in considering whether this damage was done by a peril of the sea, or was merely a consequence of the action of the sea on a weak, decayed, and unseaworthy vessel, I think you have a right to presume, at the outset, the vessel was seaworthy at the beginning of the voyage, because, as will be presently stated to you, the law so presumes until the contrary appears. You have evidence of the state of the wind and sea from the time the brig left Havana till she arrived in Key West. You also have evidence what injuries the vessel sustained, and you will say whether these injuries were done to this vessel by the violent and immediate action of the winds and waves, or whether, though suffered by reason of their action, they were attributable to the weak and decayed state of the vessel at the commencement of the voyage.

It has been stated, by the defendants' counsel, that the law requires all vessels to be so strong as to resist the ordinary action of the sea, in the voyages for which they are insured. This is true. It is also said, and you will judge whether it is satisfactorily shown, that a cross sea is ordinarily to be expected to be met with, in the Florida gulf stream, and that if this vessel broke down in such a sea, this is conclusive proof that she was not seaworthy for this particular voyage. But I do not understand that the law requires vessels to be so strong as not to receive injury from any state of the winds and sea which may ordinarily be expected in the voyage for which she is insured. This is not what is meant by the ordinary action of the winds and sea. In some sense gales and heavy seas may be said to be ordinary. They are of very frequent occurrence in some parts of the world. A vessel going round Cape Horn, in the winter, scarcely fails to encounter them. But if damage is suffered by their

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action on the vessel, or cargo, it would certainly be no defence for the underwriter to say, that in that voyage they almost always occur, and the vessel should have been strong enough to resist them. Gales of wind and heavy cross seas are not the ordinary action of the sea, in the sense of the law of insurance, and when injury is suffered by a seaworthy vessel from their action on her, she is damaged by a peril within the policy.

At the same time, if seaworthy vessels usually, and, so far as appears, always, go through such seas as are described by these witnesses to have existed on this passage, without sustaining material injury, it certainly tends to show that the injuries suffered by this vessel are to be ascribed, not to a peril of the sea, but to the insufficiency of this vessel. It is a matter of fact for your good sense to determine. The law raises no presumption concerning it, and, I apprehend, cannot safely do so. Because, when the winds and seas are not in their ordinary state, it is impossible to say, beforehand, what effects they will produce upon seaworthy vessels. One may get an unlucky twist, as seamen call it, and be broken down, while another, under circumstances apparently no more favorable, receives no injury. And therefore there is no legal presumption to guide you; but you must consider and weigh the probabilities of the case, and say whether the plaintiffs have satisfied you, considering the state of the wind and sea, the kind and degree of damage suffered by the brig, the general condition in which she was found by the surveyors, and the uniformity with which great numbers of vessels encounter such seas without receiving injury, that these were damages done by perils of the sea. If you find damage was done to the vessel by perils of the sea, which it would cost \$300 to repair at Key West, then you must proceed further. The policy does not insure against partial losses of

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less amount than ten per cent., and therefore you cannot find for the plaintiffs less than \$300; but if you find that more than that sum was necessary to repair damage done to the vessel by a peril of the sea, you will then inquire whether the plaintiffs are to recover for a total or a partial loss.

The vessel was not, in point of fact, totally lost. She remained *in specie*, and was capable of being repaired. But still the plaintiffs may be entitled to recover as for a total loss. In order to do so, however, they must show that they have seasonably tendered to the underwriters a sufficient abandonment, or that this was a case in which no abandonment was necessary.

Their letter of abandonment has been produced. It states that the vessel has been condemned at Key West, and refers to a letter from the master to the owners, which was sent therewith. The contents of this last letter are, I think, incorporated into the letter of abandonment by the reference to it which the latter contains; but still there is no statement whatever of the cause of the damage. Nothing is said, in either letter, respecting any peril of the sea. Now, a letter of abandonment must state the cause of the loss, and the cause stated must be a peril within the policy. I instruct you, therefore, that there was not any sufficient abandonment.

Was this a case in which no abandonment was necessary? An abandonment is necessary only in case of a constructive total loss; if the loss be actually total the insured may recover for it, without an abandonment. It has been much discussed what constitutes a total loss when the vessel remains *in specie* and still retains the form of a vessel, in a place of safety. I shall not trouble you with the different views which have been taken of this question, but I will state the rules which I deem proper for your

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guidance. It is manifest that the form of a vessel may remain and be in a place of safety, and yet, for all useful purposes, the vessel may have ceased to exist. If she be absolutely incapable of repair, so as to be fitted to encounter the seas, then she has ceased to exist *as a vessel*, though great part of her materials may remain, and they may still be in the form of a vessel.

So, though capable of being repaired and restored to the condition of a sea-going vessel, yet if this can only be done at an expense exceeding the value of the vessel when repaired, it is an expense which no one is bound to incur, and therefore the case is the same as if absolutely irreparable; there being no practical difference, for this purpose, between what cannot be done at all, and what no prudent person would undertake to do.

And, therefore, if you should find, from the evidence in the case, that the injury suffered by this brig from perils of the sea were so great, that they could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss, and no abandonment was necessary.

And here you will perceive it is necessary to have some standard to which to refer in fixing the value of the vessel, when repaired. The parties have agreed in the policy on the value of the vessel; they have fixed it at \$3,000; is this sum to be taken as her value when repaired, or are you to inquire into what would have been her actual value at Key West, in case she had been repaired? This is a question of no small difficulty, owing to the particular terms of this policy. The general rule, as settled by the Supreme Court of the United States, would require you to ascertain what the value of the brig would have been if repaired, and the agreed valuation, so far from being conclusive, would not usually afford any considerable aid in arriving

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at this result. But I find great difficulty in holding that rule applicable to this policy, which contains a clause, "that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured;" and further, "in the adjustment of claims for repairs in the vessel, whether in the nature of a partial loss, or general average, there shall first be a deduction of one third, new for old, from the cost of labor and materials required in making the repairs."

Now, suppose you take the estimate of the surveyors at Key West to be correct, that it would cost \$2,000 for labor and materials to repair the brig, and then ascertain what these insurers would be liable to pay, under an adjustment as of a partial loss; and it would stand as follows:

Cost of labor and materials,	\$2,000.00
$\frac{1}{3}$ new for old,	666.66
	<hr/>
Partial loss,	\$1,333.34
Defendants insured,	\$2,000
$\frac{1}{3}$ of the valuation, and pay $\frac{1}{3}$ partial loss =	888.88,

which is less than half the amount insured; so that there was no right to abandon for a constructive total loss. And yet, if the opinion of the surveyors is to be adopted, the vessel, when repaired, would not have been worth \$2,000, and therefore if you were to disregard the valuation in the policy, and take the opinion of the surveyors to be well founded, there would be an actual total loss, for which the insured might recover without any abandonment, though, according to his own contract in the policy, it was not even a case of constructive total loss, upon which he could recover with the aid of an abandonment.

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This consequence seems to me to be so inconsistent with what the parties must have intended, that I should be forced to it with great reluctance; and therefore I have concluded to instruct you that, upon this particular policy, you are to take the agreement of the parties as fixing the value of the vessel, for this, as well as other purposes. This is a new question in the courts of the United States, so far as I know, and one of much importance, and I shall keep my mind open for its more deliberate consideration hereafter, if it should be again presented; but you will take the rule to be as I have stated.

On applying these rules to the facts, as you may find them upon the evidence, if you come to the conclusion that there was not an actual total loss, you will then consider whether the plaintiffs can recover as for a partial loss. The defendants deny their liability, because they say the vessel was not seaworthy.

There is an implied warranty connected with marine policies that the vessel, at the outset of her voyage, is seaworthy for the voyage in which she is insured. This obligation is imposed, by law, on the insured for sound reasons. It takes away all temptation to expose life and property to the dangers of the seas in vessels not fitted to encounter or avoid them. It is not a contract that the owner will use diligence to make his vessel seaworthy, but an absolute warranty that she is seaworthy; and if broken the policy is made void.

But, as I have already indicated, the presumption is that this brig was seaworthy, and the burden of proof is on the underwriters, by some sufficient evidence, to remove this presumption. This may be done either by proving the existence of defects amounting to unseaworthiness before she sailed, or that she broke down during the voyage, not having encountered any extraordinary action of

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the winds or waves, or any other peril of the sea sufficient to produce such effect upon a seaworthy vessel, or by showing that an examination, during the voyage, disclosed such a state of decay and weakness as amounted to unseaworthiness, for which the lapse of time and the occurrences of the voyage would not account.

In this case the hull of the vessel is alleged to have been unseaworthy. It must be obvious to you that there are great diversities in the strength and durability of the hulls of vessels. Some are built of the strongest and most durable materials, others of less durable materials, and not so heavily timbered, or firmly fastened. Some are quite new, others old. Some retain their original shape, others, from stress of cargo, or taking the ground, have had their original lines impaired. Yet all may be seaworthy. These diversities are known to underwriters, and they apportion the premiums which they charge to the risks dependent on the original structure, age, and general condition of the vessels they insure. But the existence of these differences in seaworthy vessels does not prove that there is no practical standard of seaworthiness. There is such a standard; necessarily expressed in general terms, but capable of being applied, by an intelligent jury, to the proofs in the cause. The hull of the vessel must be so tight, stanch, and strong as to be competent to resist the ordinary attacks of wind and sea during the voyage for which she is insured. You will apply that standard to this case.

The Jury found a verdict for a partial loss.

Blake, for plaintiffs.

Ames & Jenckes, (with whom was *Carpenter*) for the defendants.

ALEXANDER T. STEWART *et al.* vs. GIDEON L. SPENSER
et al.

An assignment for the benefit of creditors, made by a debtor who has absconded to a foreign country, carrying with him a large sum of money, is fraudulent and void as to creditors, if it contains a stipulation for a release as a condition of obtaining a preference under the assignment.

Whether an insolvent debtor who assigns but a part of his property for the benefit of all his creditors, can stipulate for a release in Rhode Island, *quære?*

THIS was a Bill in Equity, brought by certain judgment creditors of a mercantile firm of Horton & Brother, of the city of Providence, against Gideon L. Spenser and Thomas Pierce, Jr., and others, to set aside an assignment of property made by Horton & Brother, for the benefit of their creditors. As the decision turned, in part, on the particular terms of the deed, its substance is here given.

“ Know all men by these presents : That we, Theodore Horton and Ferdinand Horton, both of the City and County of Providence, State of Rhode Island, copartners in trade under the name and style of Horton & Brother, in consideration of the trusts and provisions hereinafter declared and made for the benefit of the creditors of said firm, and of one dollar to us paid by Gideon L. Spenser, of North Providence, and Thomas Pierce, Jr., of Providence, do by these presents give, grant, bargain, sell, assign, set over, and convey unto them, the said Spenser and Pierce, their heirs, executors, administrators, and assigns, all our right, title, and interest, &c., [describing the property.] In special trust, however, for the uses and purposes following, to wit: In trust that they shall, as soon as reasonably it can be done, make sale at public auction or otherwise, of the goods, chattels, and real estate aforesaid, and so far as

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practicable, make collection of the claims and demands aforesaid, and the proceeds of such sales and collections after defraying therefrom the expenses incident to the making of this assignment, and the executing of the trusts herein declared, including herein a reasonable compensation for their services, they shall apply and appropriate in the manner and in the order following, to wit:

"First. They shall, out of said proceeds, pay in full, if said proceeds be sufficient, otherwise ratably, the just claims now holden against us by the persons, firms, and companies following, namely: The Providence Dyeing, Bleaching, and Calendering Co., &c., [specifying certain preferred creditors.]

"Second. They shall pay out of the residue of said proceeds in full, if sufficient, otherwise ratably, the just demands of all those creditors of the firm of Horton & Brother, who shall, within *four months* from the date hereof, present to our assignees their claims, with satisfactory proofs of correctness, *and execute and deliver for us a release or releases of their respective claims against the undersigned.* And

"Third. They shall divide and distribute the residue of said proceeds, if any there be, after making payments as above ordered, ratably and in proportion to their respective claims, among those of our creditors who shall, within eight months from the date hereof, present to our assignees their claims, with satisfactory proofs of correctness. And we do hereby severally and jointly constitute and appoint the said Spenser and said Pierce our attorneys, with full power and authority, for us and in our names to do and perform all acts proper and necessary in the executing of the trusts herein declared."

The general allegation in the bill was, that this assignment was fraudulent and void as against the creditors of

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Horton & Brother; and the plaintiffs pray that this obstruction to the levy of their executions may be removed by a decree of the Court, declaring it to be void as to creditors, and requiring it to be delivered up to be cancelled. The residue of the facts appears in the opinion of the Court, which was delivered by

CURTIS, J. The first question is, whether this deed of assignment is fraudulent and void as to creditors. In deciding it, not merely the terms of the deed itself, but all extraneous facts which have a bearing on the legal result, must be taken into view. A conveyance, made by an insolvent debtor, may be fraudulent on its face, containing provisions which the law deems necessarily, and under all circumstances, fraudulent in their operation; or it may be void as against creditors solely, by reason of matter *dehors* the deed, from a want of consideration, or of good faith; or it may have the effect to defeat or delay creditors by reason of some provisions in the deed, operating in connection with particular states of fact shown to exist out of the deed, though the same provision, in a deed, not connected with such other extraneous facts, would not hinder or delay creditors, and so would not render the deed invalid.

Before looking into the deed itself, therefore, it is necessary to ascertain the state of facts which accompanied its execution, and upon which it was intended to, and must operate.

These facts are, that Horton & Brother, in August, September, and October, 1850, generally under representations that they were worth forty thousand dollars over and beyond enough to pay their debts, obtained credit for merchandise to the extent of upwards of sixty-two thousand dollars; that on the 4th day of December, 1850, without

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any just cause, they stopped payment; that from that time down to the eighth day of March, 1851, when the assignment was made, no considerable amount of their debts having come to maturity so that they could be proceeded against at law, they continued to make large sales, and thereby realized in money a very large sum, shown by the proof to be nearly, if not quite, fifty thousand dollars; that they ceased to keep a bank account, and retained the proceeds of their sales in their own possession; that they made proposals to their creditors to compromise with them, but these proposals the creditors refused to entertain, except upon condition of first examining their books, which was declined; that one of them professed to friends, and probably entertained apprehensions, that he might be proceeded against criminally for fraud in obtaining credit, and was in feeble health, and through Spenser, one of the assignees, made inquiries respecting a place of refuge from his creditors, and through the same agency, arrangements were made which resulted in the flight presently to be mentioned. On the evening of Saturday, the eighth day of March, they executed the deed of assignment, which, by previous concert between them and the assignees, was not delivered until the next Monday morning, and immediately after twelve o'clock of the night of Saturday, they left Providence secretly, got on board a vessel in the bay bound for Cuba, going under feigned names, conveying with them the money they had received from the sales of their merchandise and other property, and have not since returned; both the assignees knew when they agreed to accept the assignment, that the Hortons were about to leave the State, and when they did accept it, they knew they had left, and had good reasons to believe they had sailed for Cuba. They had also good reason to believe they had carried away money; but how much they were

not informed, until by subsequent investigation they ascertained the extent of their sales, and that no money, and no considerable amount of debts receivable were left behind. The property assigned is not sufficient to pay their debts; but if their whole property had been honestly appropriated to this purpose, it would have been sufficient to pay every creditor in full.

Such were the facts which surrounded this deed, and upon which it was designed to operate.

The first feature in this deed requiring notice, is the clause which secures a preference to those creditors who should release the assignors within four months. There can be no doubt respecting the intention with which this clause was inserted, or the object which it was calculated to effect. Its design was to induce creditors to release them, and it was adapted to produce this effect by holding out the expectation of securing a larger dividend, or payment in full, by compliance with this condition. The question is, whether a debtor, who has absconded from the country, carrying with him a very large sum of money, has a right so to frame a conveyance of the residue of his property, as to secure to himself a chance of a release. To determine this question, it would seem only to be necessary to consider what the object is, which such a debtor is attempting to reach, and what are the means by which he endeavors to reach it. That object is the permanent and final withdrawal from his creditors of the money he has fraudulently carried away with him, and the safe and effectual reservation of it to his own use. And the means of accomplishing this object are, to marshal the residue of his property, and by means of it, to create inducements to creditors to give their assent to his unjust design.

Now it may be admitted that a debtor has a legal right

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to pay one creditor in preference to another, when he cannot pay both, and consequently that he may make preferences in assignments of property made for the benefit of creditors. I think, also, it must be taken to be settled law for this case, that a debtor may stipulate for a release, by which his future earnings will be discharged. *Brashear v. West*, 7 Peters, 608; *Halsey v. Whitney*, 4 Mason, 218. But it would be as inconsistent with natural right, as with the principles of the common law, and the express language of the 13 Eliz., ch. 5, reenacted in Rhode Island, to hold, that however innocent a stipulation for a release may be in itself, and under many circumstances, yet, if it be designed to be an instrument of fraud, and calculated to enable the debtor to withdraw from his creditors what it is his legal and moral duty to pay them, such a deed can stand. The object itself is an unlawful one, and taints with fraud any means, however innocent in themselves, which are laid hold of to accomplish it.

A debtor who can pay in full, but who forms the fraudulent design to pay but a part of his debts, and keep the residue of his property to his own use, and makes a conveyance designed to aid him, and containing provisions capable of aiding him, in dishonestly withholding from his creditors what belongs to them, is within the very words, as well as the mischief, of the 13 Eliz., ch. 5. Such a deed is made and contrived of fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors.

That these debtors were able to pay all their debts in full, and fraudulently absconded with a great sum of money, is scarcely controverted; that they entertained the design permanently to withdraw this money from their creditors, and made this assignment, instead of leaving the property to be disposed of by the law, partly in order to

obtain a release, I am satisfied by the proof. It would be, to the last degree, weak and blind not to perceive a fraudulent intent on their part, pervading their whole conduct. It is correctly argued that their intent, however bad, cannot vitiate a legal conveyance. But the question whether the conveyance is legal or not, depends upon the fact whether it is capable of effectuating or aiding to execute their unlawful intent to hinder and defeat creditors. If so, it is void, though the same deed, made with an honest purpose, might be good. An unlawful intent is not predicable of an act which is itself lawful, and cannot, by any possibility, produce an unlawful effect. But if a deed may have an unlawful effect, if it may be an instrument to aid in the execution of an illegal design, then it is a legitimate inquiry whether, in point of fact, such a design existed, and whether the deed was made in pursuance of it; and if found to be so, it is unlawful and void. And in this case, the Hortons, entertaining the unlawful design to hinder and defeat their creditors, by withdrawing from their reach a large sum of money and appropriating it to their own use, and having made this deed partly in consequence of that design, and to aid them in its complete execution, and the deed containing a provision capable of thus aiding them, it is forbidden by the law of Rhode Island, and is void as to creditors.

Suppose one of the assignees, with the knowledge of facts they had, had purchased and paid a full consideration for a piece of land belonging to the Hortons at the time this assignment was made; it could not be doubted that a deed thereof would be void as to creditors, for the reason that its design must have been to convert land into money, so that it could be withdrawn from creditors; so this deed is void, because its design is, not to enable them to carry away the money, but what is also unlawful, to keep it to their own use.

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It will be perceived, therefore, that this case stands upon an actual fraud on the part of the debtor, and a deed made with intent to execute that fraud, and capable of aiding in its execution, and that the whole extent to which it is necessary to go, is to hold that an absconding debtor cannot so marshal property which he leaves within the State, as to enable himself to keep to his own use, what he fraudulently carries away with him. For such a purpose, he has no power of control over his property, and if he attempt to exercise it, his act is void as to creditors.

It is quite unnecessary, therefore, to examine the numerous decisions which have been cited. They are all consistent with the conclusion at which I have arrived, however widely they may differ among themselves respecting the rules as to assignments for benefit of creditors in different States. *Halsey v. Whitney*, 4 Mason, 218, was a case where all actual fraudulent intent was disclaimed, and the sole question was, whether the deed was fraudulent on its face. It has been suggested that this was a decision that a debtor, who conveyed only a part of his property, might stipulate for a release. I do not so consider it. Certainly the fact was not before the Court that the debtor had any other property. It is true, Mr. Justice Story says, page 218, he does not deem the fact material in that case. Why not material in that particular case, does not appear, and the facts are imperfectly stated. It would seem that he was considering, not an assignment for all creditors, but a special assignment for the benefit of particular creditors who had assented to it, though under what posture of the facts it could have been so viewed, does not appear. *Nostrand et al. v. Atwood et al. & trs.* 19 Pick. 281. But that the learned judge did not intend to decide that a release might be stipulated for, when a part of a debtor's property had been reserved

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to his own use, I am led to think by the evident reluctance with which he arrived at the conclusion, that even a release of a debtor's future earnings could be required, and by the apparent approbation he gives to the decisions of *Seaving et al. v. Brinkerhoff*, 5 Johns. Ch. R. 329; *Austin v. Bell*, 20 Johns. 442; and the distinction which he points out on page 230, between the New York cases and the other decisions. *Brooks v. Marbury*, (11 Wheat. 78,) is also clearly distinguishable from this case. That deed was not alleged to be fraudulent as against creditors, but to be void at common law; and the defect was supposed to consist in the fact, that the grantor entertained a hope that it might have an influence in suppressing a prosecution for a felony. But the deed itself contained no provision calculated, or adapted to realize that hope. If it had held out a preference to those creditors who should forbear to prosecute, it cannot be doubted the Court would have declared it void. So in this case, the mere fraudulent intent of the debtors permanently to withdraw a large sum of money from their creditors, would not vitiate a deed, even if it were made with a hope that, because of making it, a settlement would be more likely to be made with creditors. But when the deed is so contrived as to operate as an instrument to obtain impunity for the fraud, then it is tainted with the fraud of the grantors; their unlawful intent, instead of resting in their own breasts, has entered into the deed, and shaped its terms, and modified its effect, and framed it into an instrument of fraud, whereby to hinder and defeat the lawful rights of their creditors, and therefore it is void.

There are many decisions that an assignment of part of a debtor's property, for the benefit of all his creditors, stipulating for a release, is fraudulent in law and void. *Steere v. Steere*, 5 Johns. Ch. Rep.; *Seaving v. Brinkerhoff*, 5 Johns. Ch. Rep. 329; *Hyslop v. Clarke*, 14 Johns. 458;

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Sheldon v. Dodge, 4 Denio, 217; *Leutillon v. Moffat*, 1 Ed. Ch. 451; *Thomas v. Jenks*, 5 Rawle, 221; *Hennesey v. Western Bank*, 6 Watts & Serg. 301; *In re Wilson*, 4 Barr, 430.

Although it is difficult to resist the force of some of the reasoning in these cases, I am not prepared to say that such a deed is necessarily fraudulent on its face. If the property not conveyed by the assignment is left within the reach of creditors, if no actual fraudulent intent by the debtor existed, and upon the whole case, it appears that the instrument was not designed to aid any fraud, and could not so operate because, in point of fact, no fraud was either practised or intended, perhaps it would be going too far to say that, under the laws of Rhode Island, such an instrument would be void. But, in my judgment, the only possible question as to the soundness of these decisions arises from the fact, that they hold the presumption of fraud to be conclusive, and refuse to look beyond the instrument. That such provisions may be made an instrument of fraud, and when proved to be so, the assignment is void, I entertain no doubt.

Still it is not necessary to decide any such question in this case, and I have only intended to express my dissent from the position that *Halsey v. Whitney* is to be considered as settling that law for this circuit.

Besides, if the instrument be not void on its face, the creditors who have assented to this deed, have all done so after the attachments were made, and therefore with notice that the deed was impeached as invalid against creditors. That under some circumstances, the assent of creditors to an assignment made for their benefit may be presumed, I have no doubt, *Halsey v. Whitney*, 4 Mason, 218; that when a valid deed is delivered to a trustee the legal estate vests at once is clear, *Brooks v. Marbury*, 11 Wheat. 78; but I am not prepared to hold that the assent of creditors to a void

deed is to be presumed, because the whole foundation for the presumption fails. The law cannot deem such a deed beneficial to the third party. Upon the assumption that the deed is valid upon its face, and is rendered void only by extraneous facts, the assent of creditors is still not to be presumed, because, as Chief Justice Hosmer says, in *Camp v. Camp*, 5 Conn. 300, "the presumption of assent is not founded on the face of the instrument, but in the nature and circumstances of the entire case." Nor will such an assent be presumed to the prejudice of the just rights of third persons; a legal fiction is not to be permitted so to operate. *In fictione juris, semper æquitas existit*. 11 Rep. 51; 3 Rep. 56; *Waring v. Denbury*, Gilb. Ex. R. 223. Being void as against creditors when made, the attachments by the creditors were legal, and the subsequent assent of other creditors could not purge the fraud, nor render the deed valid as against the attachments; and being actually, and not merely constructively fraudulent, it is wholly void, and cannot be allowed to stand as a security to a third person who has assented to it, with notice of the fraud, or of such facts as were sufficient to put him on inquiry, and enable him to learn the existence of the fraud. *Boyd v. Dunlop*, 1 Johns. Ch. R. 482; *Harris v. Sumner*, 2 Pick. 129; *Halsey v. Whitney*, 4 Mason, 218.

I have also been referred to the charge of Judge Haile, of the Supreme Court of Rhode Island, on a trial of an action at law in which this deed came in question. I gave my assent to that part of this charge, in which the jury were instructed, "that it must be proved that Horton & Brother intended to defraud by this deed, and that the deed was actually the instrument to defraud, or it does not hinder, delay, or defraud creditors; but if you find this to be the fact, then the deed is void."

It is upon this ground, as already stated, that I hold

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this deed void ; and in respect to the question, whether it is void on its face, I do not find it necessary to express an opinion.

Let a decree be entered, in conformity with the prayer in the bill, save that no injunction to stop the prosecution of the suit in the State Court, can be granted by this Court.

GEORGE C. BETTON, ASSIGNEE, &c. *vs.* DAVID M. VALENTINE.

The assignee of an insolvent debtor, appointed under the laws of the State of Massachusetts, does not so far represent creditors in the State of Rhode Island, as to be able to avoid a conveyance of personal property in the latter State, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island.

THIS was a motion by the plaintiff for a new trial. The facts appear in the opinion of the Court, delivered by

CURTIS, J. The plaintiff brought an action of trover against the defendant, to recover damages for the conversion of a quantity of merchandise in a shop in the city of Providence. He proved that the goods had belonged to one Macy, who, on his own petition, was decreed to be an insolvent debtor, under the laws of the State of Massachusetts, and that the plaintiff, having been duly appointed his assignee, the commissioner of insolvency, having jurisdiction of the matter under the laws of that State, pursuant to the authority conferred upon him by those laws, conveyed to the plaintiff, as assignee for the benefit of creditors, all the estate, both real and personal, of the insolvent. On the part of the defendant it appeared that at the time when the plaintiff demanded the goods, he

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was in possession of them, claiming under a mortgage made in the city of Providence, by Macy, before filing his petition for the benefits of the insolvent law, to a trustee, conditioned for the security of three several debts, alleged to be due, to the defendant and two other persons. The plaintiff averred this mortgage was fraudulent as against creditors, and so, invalid as against him, and the first question is, whether the plaintiff, as assignee in insolvency under the laws of Massachusetts, has such a title to these goods in Rhode Island, as will enable him to avoid a conveyance fraudulent as against creditors, and thus maintain this action.

It is a question of much interest and of more than ordinary importance. In the absence of a bankrupt law of the United States, many of the States have enacted insolvent laws for their own citizens, and the effect of those laws upon the property of the insolvents in other States is of much moment.

The 13 Eliz. c. 5, has been reenacted by the legislature of Rhode Island, almost in the very words of that statute. Digest, 222. By force of this statute a conveyance of goods, made with intent to delay, hinder, or defraud creditors, is declared void as against those who, by such conveyance, might be hindered, delayed, or defrauded; that is, void as against creditors. As between the parties, the conveyance is valid, and effectual to pass the property. It is only as the representative of creditors, and by virtue of their rights, that the plaintiff can avoid this deed, and the question is, whether, in the State of Rhode Island, and in respect to personal property within that State, the plaintiff does thus represent creditors, and is clothed with their rights, so as to be able to avoid a deed, for a fraud on the creditors of the insolvent debtor.

This is a trial at the common law, and the rules of decision in this Court are the laws of the State of Rhode

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Island, there being nothing in the Constitution, treaties, or statutes of the United States affecting the question ; which is therefore to be determined here, upon the same principles as would govern the highest Court of Rhode Island, sitting to administer the common and statute law of that State. Sec. 34 of the Judiciary Act.

I mention this, because it seemed to be assumed in argument, that this Court might allow some greater effect to the laws of Massachusetts, than a Court of the State of Rhode Island could. But the only difference is, that this Court is bound to take official notice and to have judicial knowledge of what the laws of Massachusetts are, while a Court of the State must have such laws exhibited and proved to them ; but, when shown, their effect upon this question, in one tribunal, should be precisely the same as in the other.

I proceed, therefore, to examine this interesting question, first premising, that I am not aware that it has ever been touched upon by the Supreme Court of Rhode Island, or that there is any thing peculiar in the legislation or customary law of this State bearing upon it. It must therefore be discussed upon those principles of general jurisprudence which may be found applicable to it.

It is known that great diversities of opinion have existed and do still exist, respecting the effect to be allowed to assignments by force of foreign bankrupt and insolvent laws. On the one side, it is the settled law of England that the assignment of a bankrupt's effects, under the bankrupt law of a foreign country, passes all his movable property and debts to the assignees, whose title is recognized as paramount. *Solomons v. Ross*, 1 H. Bl. 132, n.; *Ex parte Blakes*, 1 Coxe, R. 398; *Hunter v. Potts*, 4 T. R. 182; *Sill v. Worswick*, 1 H. Bl. 691 - 4; *Phillips v. Hunter*, 2 H. Bl. 402; *Quilin v. Morrison*, 1 Knapp, Ap. R.

265, n.; *Sellrig v. Davis*, 2 Rose, B. C. 291; *Alison v. Furnival*, 1 Cr. M. & R. 296.

This doctrine has been admitted to be one of universal obligation, and maintained with much learning and ability by Hon. Chancellor Kent, in *Holmes v. Remsen*, 4 Johns. Ch. R. 485. But at a later period, and after a wide survey of the decisions, he says, "The weight of American authority is decidedly the other way, and it may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicile with regard to the rule of preferences in the case of insolvent's estates." 2 Kent's Com. 406.

An elaborate examination of the American decisions on this subject is not necessary; but it will be useful to show how far they have advanced in the direction of the question now to be determined, and to ascertain what principles they have settled.

They have involved the rights of creditors, seeking payment by means of remedies afforded *lege rei sitæ*, in conflict with the rights of the foreign assignees; and their general result may be stated to be, that the assignee, under a foreign system of bankrupt law, takes no title, which can prevail against the remedies afforded to creditors of the bankrupt, by the law of the place where the property or the *chose in action* of the bankrupt is attached, or levied on. The cases of *Blake v. Williams*, 6 Pick. 286; *Milne v. Moreton*, 6 Binney's R. 353; *Saunders v. Williams*, 5 N. H. R. 213; *Lord v. Brig Watchman*, Ware's R. 232; *Abraham v. Plestoro*, 3 Wend. 538, contain elaborate descriptions of the principles and authorities bearing on that question.

In arriving at this result some courts have gone further than others in respect to the effect to be allowed to such an assignment.

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Some have rested upon the ground that the creditors who are citizens of their own States cannot be deprived of the remedies secured to them by their own laws; that the comity of nations does not require what is so inconsistent with the interest and policy of another State. *Merrick's Estate*, 2 Ashmead, 485; S. C. 5 Watts & Serg. 20; *Lowry v. Hall*, 2 Watts & Serg. 129; *Mulliken v. Aughinbaugh*, 1 Penn. R. 117.

This class of cases, while it postpones the rights of foreign assignees to those of domestic creditors seeking the benefit of their own laws, admits that such assignees have a title. By some extension of the same doctrine it is made applicable in behalf of foreigners suing in the courts of the State, as in the case of *Abraham v. Plestoro*, 3 Wend. 538; while other courts, and among them the Supreme Court of the United States, have asserted the broad doctrine that a foreign involuntary assignment cannot pass the property which is not of the country in which such bankrupt law prevails. Thus Mr. Chief Justice Marshall, delivering the opinion of the Court in *Harrison v. Sterry*, 5 Cranch, 302, says: "As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two thirds of the funds are liable to the attaching creditors, according to the legal preference obtained by their attachments." And although the Court were here only examining the point as between the assignee and attaching creditors, yet the ground on which the rights of the latter are vested, is a denial of all operation of the bankrupt law of England to pass property in the United States. See, also, *Ogden v. Saunders*, 12 Wheat. 262, 363, 364.

Having thus ascertained the doctrines of the American Courts, it will be useful to consider what principles are maintained by the English Courts as essential to the title

of a foreign assignee, and how far those principles are admitted in our jurisprudence. Such an examination will lead at once to a determination of the question at bar.

The main principles upon which the English Courts rest these titles are —

First. That principle of general jurisprudence, that personal property is deemed, by fiction of law, to be situated in the country in which the bankrupt has his domicile, and to follow the person of the owner. The application of this rule to the title of assignees in bankruptcy, is necessarily denied by the American cases, for if admitted, it makes the title of the assignee paramount to all rights of creditors. Every case, therefore, in which the right of an attaching creditor has been maintained is inconsistent with the application of this principle to such titles.

Second. The owner has a disposing power over his own property, wherever it may be situated, and the assignment of a bankrupt's effects may be considered as his own act, as it is in the execution of laws by which he is bound, and he voluntarily committed the act, which authorized the making of it. *Goodwin v. Jones*, 3 Mass. R. 517; 1 H. Bl. 437, 8, 9, n.; 8 East, 314, 16, n.

If this position is admitted to be sound, it only places the assignee in bankruptcy in the same condition as an assignee under a voluntary assignment by the debtor. It refers the creation of the title to the disposing power of the owner, and consequently admits that no title passes which the owner could not convey. This, I understand, to be the extent of the English doctrine.

Thus, in the leading case of *Phillips v. Hunter*, 2 H. Bl. 402, 403, the Court say: "It is a proposition not to be disputed, that, previous to the bankruptcy, the bankrupts themselves might have transferred this property, though abroad, as absolutely as if it had been in their own tangi-

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ble possession in this country; and it seems that the assignees, under their commission, were entitled, by the operation of law, to do with it after the bankruptcy, *what the bankrupts themselves might have done.*" So in *Hunter v. Potts*, 4 T. R. 192, the Court said: "The only question is whether the property in that island passed by the assignment, *in the same manner as if the bankrupt had assigned it by his own voluntary act.* And that it did so pass cannot be doubted, unless there was some positive law of that country to prevent it." See, also, *Sill v. Worswick*, 1 H. Bl. 690, 691; *Holmes v. Remsen*, 4 Johns. Ch. R. 470.

It is as the representative of the bankrupt, as possessing his title, under a transfer from him by virtue of his disposing power, that the title of the foreign assignee has been maintained.

As the representative of creditors merely, as clothed with their peculiar rights, I am not aware that any court, with an exception presently to be noticed, has ever recognized a foreign assignee in bankruptcy or insolvency; and there seem to me to be insuperable difficulties in the way of doing so. Standing merely as the representative of creditors, appointed under the law of a foreign State, upon what principle of international jurisprudence is he to be distinguished from a foreign administrator, whose title is acknowledged nowhere, under the common law? He derives his authority from no principle of general jurisprudence, as he does when considered as representing the owner under the *jus disponendi*, but solely from the operation of a foreign local law, which not merely clothes him with the rights of creditors, but creates and regulates those rights.

Systems of bankrupt and insolvent law necessarily define the rights and powers of the assignee as against all

third persons, and generally contain many provisions which, though deemed necessary to the policy of the system, are in themselves arbitrary, and find no place in general jurisprudence. Payments and transfers made by the bankrupt, or insolvent, within certain periods of time, or with certain intents, are declared void; and the title of the assignee dates from some act of the bankrupt, or of a public officer. These are rights in behalf of creditors, and as their representative, with which the assignee is clothed by the law under which he is appointed. They can have no place in any other system of law, and an attempt to enforce them in a foreign country would be universally allowed to be futile. But with what propriety can a foreign assignee be admitted to stand as the representative of creditors, when he is not allowed to bring with him the rights which really constitute that office, and for the enforcement of which he was appointed? And what consistency is there in holding that the foreign law cannot create or regulate the peculiar rights of creditors, which must depend solely on the law *rei sitæ*, but that it may create an office and appoint a person to represent and enforce the rights which the law *rei sitæ*, confers? That would be to prohibit the assignee from doing that which alone he was appointed to do, and permit him to do that which he was not appointed to do.

Such a result is inconsistent with sound reason, and would be likely to be productive of no small confusion and inconvenience in practice. It is held in Massachusetts, *Butler v. Hildreth*, 5 Met. R. 49, that an assignee may affirm a sale, fraudulent and void as to creditors; and if he has power to avoid such a sale, it would be difficult to maintain that he has not also power to affirm it, and recover the consideration. Who is to be bound by such affirmance? Suppose he recovers the consideration from

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the fraudulent grantee, are the creditors in Rhode Island precluded from avoiding the sale? If they are, then the statute law of Rhode Island, which in express terms gives them the right to avoid it, is superseded and silenced by the law of another State. If they are not precluded, then it is clear the assignee does not represent them, and if not, how can he avoid the sale?

Besides, a bankrupt or insolvent law, viewed as operating on the rights of creditors, is a system of remedy. It takes out of the hands of the creditors the ordinary remedial processes, and suspends the ordinary rights, which by law belong to creditors, and substitutes, in their place, a new and comprehensive remedy designed for the common benefit of all. The rights with which the assignee is clothed, as the representative of creditors, are to render this great and common remedy effectual. A law which gives the assignee power to represent the creditors is therefore, strictly, a law of remedy, and upon no sound principle can be permitted to operate beyond the territory subject to that law.

In coming to the conclusion that a foreign assignee in bankruptcy or insolvency cannot so far represent creditors, as to avoid a transfer good as against the insolvent and his representatives, but invalid as against creditors by the law of the place where the transfer was made and the property situated, I should have felt very little difficulty, if it were not for the decision of a highly respectable Court, in the case of *Hooper v. Tuckerman*, 3 Sandf. R. 311. It was there decided that assignees, appointed under the laws of Massachusetts, as the plaintiff in this case was, might maintain a bill to set aside a conveyance made by the insolvents, and good as against them, but invalid as against creditors by the law of New York. The distinction relied on by the Court, to take the case out of the operation of previous decisions in the courts of that State,

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was, that the debtors were deemed to be insolvent, and their property went into the custody of the law, and assignees were appointed in consequence of a petition voluntarily filed by themselves. That there is any real difference, in point of legal principle, between filing a petition and doing any other act of bankruptcy, to which the law has attached the same consequences, it does not seem to me easy to perceive. It has already been stated that the English doctrine is, that the act of bankruptcy being voluntary, the property of the bankrupt must be deemed to pass to the assignee with the consent of the bankrupt. But however this may be, the bankrupt's consent can be of no importance except in connection with his *jus disponendi*, and as affecting the title which he is presumed to, or does, create. His act, whether really voluntary, or only presumed to be so, can affect no title good as against himself, nor create rights in creditors, nor confer upon a third person power to represent them. And, therefore, I am unable to perceive the soundness of this distinction, or to concur in the opinion which seems to rest upon it.

While, therefore, I am not prepared to hold that it is definitively settled by the Supreme Court of the United States that a foreign bankrupt or insolvent law can have no extraterritorial operation upon property, I am of opinion that the plaintiff in this case, merely as the representative of creditors, has no title, in Rhode Island, to property there, of which the insolvent, before filing his petition, made a transfer, good as against himself, and invalid as against creditors, by the statute law of that State.

The motion for a new trial is overruled, and there must be judgment on the verdict.

Betton, pro se.

Jenckes, for defendant.

Mallett *et al.* v. Dexter.

EDWARD J. MALLET *et al.* vs. SAMUEL DEXTER, ADMINISTRATOR OF JAMES FENNER.

When an administrator is in the process of accounting before a Probate Court, he cannot be compelled to account in this Court, by a bill in equity.

The Circuit Court has concurrent jurisdiction with the Probate Court, to decree an account in favor of distributees.

When two courts have concurrent jurisdiction, the one which first has possession of the subject must adjudicate; and neither of the parties can be forced into another court.

An account of an administrator, though settled by a judicial decree of a court of competent jurisdiction, may be opened for fraud.

THE facts of this case sufficiently appear in the opinion of the Court, which was delivered by

CURTIS, J. This is a bill in equity, filed by the next of kin and distributees, according to the law of Rhode Island, against the defendant, as administrator of the intestate estate of the late James Fenner. The cause came on to be heard on the pleadings and evidence; and it appears that the scope of the bill is, to open certain administration accounts which have been settled in the Probate Court, upon the ground of fraud, and also to require an account of the residue of the administration not embraced in those settled accounts.

These are distinct subjects, and must be separately considered. And first, as to so much of the bill as seeks for an account of the residue of the defendant's administration not embraced in the settled accounts. It appears that this bill was filed on the twenty-third day of September, 1850, and that in the month of August preceding, the defendant had filed an account in the Municipal Court for the City of Providence, which, by the law

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of Rhode Island, has jurisdiction of the probate of wills, the grant of administrations, and the accounts of executors and administrators; and that all persons interested, including the complainants, had been cited to appear and object to the said account, if they saw fit, on the twenty-fourth day of September, the next day after the bill was filed.

That the State Court thus had possession of the subject-matter, and complete jurisdiction over it, cannot be doubted. It is certainly competent for each State, under whose laws administration is taken, to confer on either of its tribunals, jurisdiction over the accounts of administrators, and to provide for their being rendered, stated, and settled, judicially, in any court of the State. *Vaughn et al. v. Northup et al.*, 15 Peters, 1. The law of Rhode Island made it the duty of the defendant to render the accounts of his administration to the Municipal Court; and when he had rendered an account there, and that court had cited the complainants to appear, not merely the items of that account, but every thing which ought justly to be included in it, and consequently the whole unsettled residue of the administration, so far as it was then a subject of account, was regularly pending for judicial examination and settlement before that court.

It is true, this Court, as a Court of Equity, has a concurrent jurisdiction over the accounts of executors and administrators, in behalf of distributees as well as creditors, as was held by Mr. Justice Story in *Pratt v. Northam*, 5 Mason, 95. But no principle is better settled, than that in all cases of concurrent jurisdiction, the court which first has possession of the subject must adjudicate upon it. *Smith v. McIver*, 9 Wheat. 582; *Wallace v. McConnell*, 13 Peters, 136; *Shelby v. Bacon*, 10 How. 56. And neither of the parties can be forced into another concurrent jurisdiction.

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It follows, that the concurrent jurisdiction of this Court cannot be exercised upon this bill, in respect to the unsettled residue of this administration, because that subject-matter was regularly pending between the same parties, before another tribunal, when this bill was filed.

It is true that the complainants, some of whom are aliens, and others citizens of States other than Rhode Island, are thus deprived of their resort to the jurisdiction of this Court; but so would all such persons have been, when sued in a State Court, had not the judiciary act enabled them to remove suits from the State Courts to the Circuit Courts of the United States; and that provision does not include proceedings of this character.

The case of *Shelby v. Bacon et al.*, 10 How. 56, on examination, will be found consistent with the result at which I have arrived. In that case, the complainant had a clear right to come into a court of the United States, to establish his claim as a creditor, and to compel the trustees to pay to him his distributive share of the assets of the bank. The State Court had not obtained jurisdiction over either of these subjects; but the Court do not decide, that if the plea had contained proper averments to show the State Court in possession of jurisdiction over the subject-matter of the accounts of the trustees, with authority to act *in rem*, the complainant could compel the trustees to come into another jurisdiction to settle the same accounts. Besides, whatever may be the effect of that particular statute of Pennsylvania respecting the accounts of assignees under a voluntary assignment for the benefit of creditors, I should feel great difficulty in holding, that an administrator, who has filed his account in the proper State Court, pursuant to the laws from which he derives his authority, and in compliance with his official bond, can be drawn away to another jurisdiction,

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and proceed to settle the same account there. In *Vaughn et al. v. Northup et al.*, 15 Peters, 1, the Supreme Court say, the administrator is exclusively bound to account for all the assets he receives, under and by virtue of his administration, to the proper tribunals of the government under which he derives his authority. And although I do not understand the Court to mean to exclude altogether the jurisdiction of the courts of the United States, but only the jurisdiction of the courts of other States, yet their language expresses strongly the capacity of the appropriate State tribunal to possess and exercise jurisdiction over this particular subject-matter, and shows the irregularity of attempting to withdraw it from that jurisdiction, when it has once passed under it. If an administrator neglects or refuses to account, I should hold him to do so upon a bill in equity in behalf of distributees, being aliens, or citizens of another State. But if he is in the process of accounting, before the appropriate tribunal, having the parties before it, I am of opinion this Court should not compel him also to account here.

The other branch of the case is that part of the bill which seeks to open settled accounts, on the ground of fraud.

The only subject necessary to be examined under this head, is the charge contained in the amended bill concerning the money paid to Burrington Anthony. The other matters stated in the bill are either not alleged to be fraudulent, but only as false charges and credits, or the proof is entirely insufficient to support the allegation of fraud, which, wherever it is made in those instances, is met and denied by the answer.

The charge respecting the money paid to Anthony is, in substance, that the estate was indebted to him, as assignee of an insolvent debtor, in the sum of nine hun-

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dred and thirty-one dollars and fifty cents; and that the defendant agreed with Anthony to pay him eight hundred dollars, and take his receipt for the whole debt, for the purpose of charging the estate as if he had paid the whole, Anthony agreeing to keep it secret. That the receipt was accordingly given; and upon that, as a voucher, supported by the defendant's oath, the whole sum was allowed to the defendant, in an account settled by him in the Municipal Court, March 13, 1848, the complainants being then ignorant of the facts.

The first question is, whether this matter also was not pending before the Municipal Court when this amendment was made to the bill, on March 24, 1851. It does not appear that at that time any administration account was pending before the court; though one was filed on May 9, 1851. And if there had been an account then pending, a charge of fraud in a previous account, with a view to obtain a decree to open it, is so far a distinct subject-matter, that I should hesitate to say it was before the Municipal Court, and within its jurisdiction, because it had another account pending before it. It has been argued, that the Municipal Court has not jurisdiction to open a settled account on the ground of fraud, because the statute law of Rhode Island (Digest, p. 247, sec. 31,) contains a provision, that "the settlement of the accounts of any executor, administrator, or guardian, by the Court of Probate, or in case of appeal by the Supreme Court, shall be final and conclusive on all parties concerned therein, and shall not be subject to reëxamination in any way or manner whatsoever."

But in *Northam et al. v. Pratt et al.*, 5 Mason 95, Mr. Justice Story had under consideration this same statute, and decided that it was not intended to give validity to the settlement of an account obtained by fraud. Such a settlement

is a nullity, and there would seem to be no reason why a Court of Probate should not treat it so, and cite the administrator to settle anew. In Massachusetts, at a time when, though there was no positive provision of statute law, there was the principle which makes a judicial decree final, it was repeatedly decided, that the settlement, even of a final probate account, could be opened by a Court of Probate for fraud; and that a Court of Equity would not interpose. *Jennison v. Hapgood*, 7 Pick. 7; *Davis v. Cowdin*, 20 Pick. 510.

I do not proceed, therefore, on the ground that the Municipal Court has not jurisdiction to open a settled account for fraud, but upon the other ground, that, when the amended bill was filed, it was not in possession of the subject-matter; and that this Court, having concurrent jurisdiction, and having been appealed to, must adjudicate. And this compels me to examine the merits of this charge.

It is certainly a very grave one, being nothing less than a charge of a conspiracy to cheat the estate, by the production of a false voucher, and the execution of that design by means of perjury.

The answer of the defendant to this charge is as follows:—

“ And this defendant, further answering, saith, that the amount due from Estate to said Anthony, amounted, with the interest, to the sum of \$931.50, in April, 1848; that the consideration in the deed, drawn by said Potter, was \$900, conveying said building to said heirs, and was dated on the 5th day of April, 1848.

“ That by an examination of the defendant's *personal* cash books, that on the 10th day of said April, in the presence of said Anthony, and for the purpose of paying him said sum of \$931.50, he obtained a check from his agent

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for \$1,000; that, on the 15th of April, afterwards, he received an instrument of writing, signed by the heirs, authorizing the payment thereof; and on the 21st of said April, he procures the receipt of said Anthony, wherein and whereby he acknowledges himself to have received \$931.50, in conformity with said instrument of writing, and on the same day charged by the administrator, in his account with the estate. And this defendant further answering saith, that at the time said Anthony applied to him to pay said sum of money, he offered to make a discount, if this defendant would advance him the money out of his own private funds, which this defendant refused to receive, and told him if he paid him any thing, he would pay him his whole debt.

"And this defendant verily believes that he did pay said Anthony the sum of \$931.50, and not \$800 only, as the plaintiffs' allege in their said bill of complaint; and that said Anthony's receipt is a true, and not a false, receipt.

"And this defendant further answering saith, that he was induced to pay said Anthony, out of his private funds, because his wife was owner of one half the property, and owed half the debt, and he did not wish to be further importuned by said Anthony."

It was stated, in argument, that this answer was drawn by the defendant himself, without the aid of counsel. Its structure and style render this highly probable. It is certainly less direct, pointed, and explicit, in responding to this charge, than might reasonably have been expected. In answering as to accounts, dates and the like, *belief* is ordinarily sufficient; (1 Vernon, 170; 4 Beav. 41,) but in answering a charge of meditated fraud, to be effected by a false voucher, supported by perjury, belief that the sum shown by the voucher was paid, is, to say the least, a feeble response. I do not allow the suggestion, that the

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defendant drew his own answer, to have any weight. It would be dangerous to permit it to operate at all, to excuse any want of directness in meeting a charge of fraud. If parties, either from false economy or self-conceit, choose to undertake what they cannot perform, in a court of justice, they must suffer the consequences. If they act for themselves, instead of employing others, in order to find shelter for any obliquity under the allowance for their short-comings, which they presume upon, they will be likely to be disappointed. I take this answer as it stands; and I do not hesitate to say, that if it was met by one witness, whose testimony was open to no exception, I should hold the charge proved. But the difficulty in the complainant's case is, that his witness comes to testify to his own turpitude. He says, in substance, that he was an accomplice in a conspiracy to cheat the estate. An agreement with a trustee, to receive a less sum for a greater, and give a receipt for the greater sum, in order to have it used as a voucher that such greater sum was paid, accompanied by an express promise to keep the real transaction secret, is a matter which no man can testify to, without seriously impairing his credit as a witness. He may tell the truth; but we have not such security in his doing so, as to render it fit to rest a judicial decree on his evidence alone. There is no rule of law which forbids the Court to credit the testimony of a *particeps criminis*; but prudence and sound reason dictate great caution in weighing such evidence, and, in my judgment, it is not sufficient to prove a charge like this. For, whatever may be said of the want of explicitness and force in the answer, it does declare the defendant's belief that he paid the whole sum due, a belief which it would seem he could not entertain if he had been guilty of this fraud. And it is not to be lost sight of, that the bill itself charges that this

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item was allowed by the Court, on the production of the voucher, supported by the oath of the defendant.

Considering that this is an attempt to open an account settled by a judicial decree, after notice to all parties; that the account was supported by the oath of the administrator; that the answer declares the defendant's belief that he paid the whole sum; that the witness comes to testify against his own receipt, in writing, given at the time; and by his testimony shows, that if there was a fraud, he so far participated in it, that the Court cannot know how far to rely upon him, I am of opinion the charge is not made out, so as to induce the Court to open the account; and the bill must, therefore, be dismissed, with costs. But I think it proper, under the circumstances, that this should be without prejudice, except as to the particular charges of fraud here adjudicated on. As to all items not adjudicated upon, specifically, in some former account, this remedy will be complete, and ought to remain open to the complainants. And as to any other matter embraced in this bill, and not adjudicated on, the complainants should be left at liberty to proceed, in that tribunal, or elsewhere, as they may be advised.

Carpenter and Jenckes, for complainants.

Ames, for defendant.

IN THE MATTER OF JOHN T. PITMAN, THE CLERK OF THE COURT.

An application to the Court to compel one of its officers to pay over money due from him in his official capacity, is a proceeding as for a contempt, and the Court has jurisdiction under the act of Congress of March 2, 1831. In such a proceeding the sworn answers of the officer are evidence in his favor.

BURRINGTON ANTHONY, lately Marshal of the United

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States for the district of Rhode Island, filed his petition, stating that, as Marshal, he received from the treasury of the United States, and paid to the Clerk of this Court, large sums of money, from time to time claimed by him for fees due to him from the United States; that subsequently, on a settlement of his accounts with the treasury, various items of the Clerk's accounts, which had been thus paid, were disallowed, and the petitioner has thus overpaid to the Clerk, the sum of twenty-five hundred dollars. He prays for an order to show cause, and the appointment of a Master to audit the account, and for an order on the Clerk to repay what may be found due.

The answer of the Clerk admits that he rendered to the petitioner charges against the United States, which, on being audited at the Treasury Department, were disallowed, amounting to the sum of twenty-two hundred and ninety-three ⁴/₁₀₀ dollars. But he denies that he had received from the Marshal any money on account of those charges. He states that he received from the Marshal certain memorandum checks, amounting to the sum of \$4,424.92, on account of the bills of cost, which embraced the rejected items; that from time to time the Marshal paid various sums on account of these checks, amounting in all to \$2,100, and leaving due thereon the sum of \$2,324.92, which exceeds the amount of the items disallowed. He annexes copies of these checks, and states that the originals have been lost since the filing of the Marshal's petition.

An order of reference to a Master to audit the accounts was made by the late Mr. Justice Woodbury, and the Master having reported, the matter came on to be heard upon exceptions to the report. The other material facts will appear in the opinion of the Court, which was delivered by

CURTIS, J. The first exception is "because the Master

has assumed that the terms of his commission confer on him no authority, to go into the private personal affairs of the parties, but must be confined to accounts between them, arising from their official capacities as officers of the court."

This exception must be overruled. Not only the terms of the order of reference, but the nature of the proceeding, required the Master to limit his action to accounts growing out of the official relations and conduct of the parties, as will be more fully stated in disposing of another exception.

The second exception is: "Because the Master determined, there was not sufficient evidence of the existence and making of the checks in question, upon which to found a right to introduce secondary evidence of their loss and their contents."

Some evidence of the existence and loss of these checks was necessary to be given to obtain a right to offer secondary evidence of their contents. But, with the exception of the one for forty-three dollars, the instruments are not negotiable, being payable on a contingency which affects both the time and the amount. Bayley on Bills, 1. They are writings of such a character as to be likely to remain in the personal custody of the Clerk, and the loss of which, therefore, would not probably be within the knowledge of any third person. His affidavit, therefore, of their loss would be sufficient, uncontrolled, to prove their loss, if it were a trial at law; and though, on such a trial, some evidence must be given to the Court of the existence of the instrument, before secondary evidence is offered to the jury of its contents, yet on a hearing by a Master, this is wholly unnecessary, because all the evidence is offered to him, and if the secondary evidence proves the contents, it necessarily proves the existence of the instrument. In this case the Master did receive and consider

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the secondary evidence, and has reported that there was not sufficient evidence of the existence of loss of checks, to found a right to introduce secondary evidence of their contents. If I considered the evidence clearly insufficient to prove the contents of the checks, I might not deem it necessary to order the report to be recommitted, on account of an erroneous ruling respecting the admissibility of this evidence; but, considering the nature of this proceeding, and the evidence which was before the Master, I am of opinion, that he has fallen into an error which affects the substantial rights of the respondent.

The Master did not treat the answer of the Clerk as evidence. This was erroneous, as will plainly appear when we consider what this proceeding is. It is an application to the Court to exercise its summary jurisdiction over its own officers, to restrain one of them from doing a wrong in his official capacity. Such a wrong is considered to be a contempt of Court, and the Court has power to proceed against and punish for it. This jurisdiction is expressly saved to the Courts of the United States by the Act of Congress of March 5, 1831, (4 Stat. at Large, 487,) which provides, that the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases, except (among others) the misbehavior of any of the officers of the said courts in their official transactions. It is in the nature of a criminal proceeding, and though often resorted to for the protection and enforcement of private rights, such as the payment of money improperly withheld from suitors by officers of the court, and the like, and though its modes of proceeding may be somewhat varied when the object is to afford a summary remedy for the violation of a private right; yet the character of the proceeding should not be lost sight of,

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and especially it should not be so varied as to deprive the party proceeded against of any substantial right.

Now one of the most important privileges accorded by the law to one proceeded against as for a contempt, is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact, by any other evidence. *United States v. Dodge*, 2 Gall. 313. "If the party can clear himself upon oath he is discharged." 4 Bl. Com. 286, 287.

Whether this rigid rule would be applied to that class of these cases which Blackstone (4 Com. 285) says, "is to be looked on rather as a civil execution for the benefit of the injured party," it is not necessary here to decide. There are certainly precedents for the introduction of other kinds of proof. *Kilpatric v. Van Diver*, 2 Rep. Con. Ct. 341; *Summers v. Caldwell*, 2 Nott & McCord, 341; *Taylor v. Howren*, 1 McCord, 418; *Daniel v. Capers*, 4 McCord, 237; *United States v. Mann*, 2 Brock 9; *The Justices v. Bivins*, 6 Georgia R. 575.

The order of reference in this case must have been made by my learned predecessor upon the footing that evidence *dehors* the answer was admissible, and I feel no disposition to disturb this order, even if there was any application by either party to do so, which there is not. But I cannot doubt that at every stage of these proceedings the Clerk has a right to rely on his sworn answers, so far as they are responsive to the charges made by the late Marshal, in his application to the Court.

Now what relates to these writings, called memorandum checks, is directly responsive. The late Marshal alleges that he paid the Clerk moneys, on account of claims for fees which were afterwards disallowed at the treasury. The Clerk denies that he paid him moneys; he says he

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gave him only his written promises to pay, which, so far as respects these disallowed claims, he has not paid.

It is argued that the Clerk, having receipted his own bills, as if the Marshal had paid them in money, for the very purpose of enabling the latter to obtain payment from the government, is estopped to deny that he did receive the money; and so he is, as between himself and the United States; but this does not render the Clerk liable to be proceeded against as for a contempt, in not repaying to the late Marshal, what he never received from him.

It is also argued that as the Clerk chose to take the Marshal's private promises in payment, he thereby closed the official transactions, and that these memorandums are private claims by Mr. Pitman on Mr. Anthony, and cannot be brought into the account by way of offset. But this view is more ingenious than sound. Mere promises, with one exception, are not negotiable. When the whole transaction is understood, they amount, in effect, only to acknowledgments by the Marshal, that he had not paid the sums receipted for, but still remained accountable to the Clerk, for so much as he should obtain from the treasury upon his bills, to the extent mentioned in these memorandums. They are not to be allowed in offset, but as evidence that the obligation of the late Marshal that he had paid, in money, the Clerk's bills, is not true. For this purpose, if produced, they would be competent and admissible, and their loss being shown by the oath of the Clerk, secondary evidence of their existence and contents is to be received. This evidence, so far as it was exhibited to the Master, consists first, in the answer of the Clerk, together with his book of original entries; and second, in the testimony of Mr. Jackson, the present Marshal. I do not propose to examine this evidence, because I think it proper, that the account should be recommitted. It is said that

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all the evidence was not laid before the Master. This is the fault of the party, and affords no ground of action by the Court; but inasmuch as the Master committed an error in not treating the answer of the respondent as evidence, and in ruling that, upon the case made, secondary evidence was not admissible, I shall send the matter to him again, to be proceeded with in conformity with this opinion.

In drawing up the order to recommit, I think a clause should be inserted, empowering the Master to examine the Clerk upon interrogatories, upon the application of the petitioner. Regularly this should have been done, in the first instance, under the direction of the Court; but it took a different course, I suppose, by consent, and went to the Master, as already stated. I am unwilling to interfere with the order which was entered; and therefore, unless some objection is made, let such a clause be inserted in the order of recommitment. If either party does object, and the petitioner desires to examine the Clerk on interrogatories, let them be prepared and exhibited to the Clerk, and if not objected to, answered here, and if objected to, the Court will settle them. The interposition of a Master, in a case like this, though convenient, and when consented to, proper, is not strictly regular, and must not be drawn into a precedent.

Something was said at the argument respecting the danger to which the petitioner might be exposed, in case these promises came into the hands of a third person for value. Not being negotiable, with one exception, there can be no such danger, and in respect to the small note, which is negotiable, a bond, with surety, can be filed hereafter to protect the petitioner, in conformity with a practice now well settled even in courts of law.

This disposes of all the important exceptions. Those

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which allege some small errors of computation can be examined by the master when he reconsiders his report.

Jenckes, for petitioner.

Joseph S. Pitman, for respondent.

SYLVANUS HOLBROOK *et al.* vs. THE AMERICAN INSURANCE
COMPANY.

Construction of clauses in fire policy respecting subsequent insurance, and termination of interest.

Meaning of the word *assigns*.

A conveyance, which equity will treat as a mortgage, does not terminate the interest of the assured.

Insurance, made by a mortgagee at the expense of the mortgagor, is subsequent insurance by the mortgagor.

THIS was an action on a policy of insurance against fire, underwritten by the defendants in the sum of seventy-five hundred dollars, on movable machinery, and stock in a cotton-mill. The destruction of the property by fire being admitted, and the preliminary proof of loss required by the policy having been proved, the defence turned on two clauses in the policy; which were in the following words: "And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not forthwith give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." . . . "The interest of the assured, in this policy, is not assignable, unless by consent of this corporation, manifested in writing, and in case of any transfer or termination of the interest of the

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insured in this policy, either by sale, or otherwise, without such consent, this policy shall, from thenceforth, be void and of no effect."

It appeared that on the 25th of April, 1850, while the policy was in force, and before the loss, the plaintiffs made a bill of sale of a large part of the property mentioned in the policy, to Shepherd, Wright & Ripley, of New York, who were the plaintiffs' factors, and to whom the plaintiffs were indebted, for a balance of account, in the sum of \$20,910, and at the same time and as part of the same transaction, Shepherd, Wright & Ripley executed an instrument in the following words:—

" This indenture, made this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and fifty, by and between Messrs. Shepherd, Wright & Ripley, of the city, county, and State of New York, commission merchants, of the one part, and Sylvanus Holbrook & Company, of Northbridge, county of Worcester, and State of Massachusetts, of the other part, witnesseth, that the said Shepherd, Wright & Ripley do hereby lease, demise, and let unto the said Holbrook & Company, all that portion of cotton machinery which the said Holbrook & Company have sold to said Shepherd, Wright & Ripley, by bill of even date, amounting to the sum of twenty thousand nine hundred and ten dollars, all now in good running order, placed in the mill now occupied by the said Holbrook & Company —

" To hold for the term of five years from date, the said lessees yielding and paying therefor at the office of Messrs. Shepherd, Wright & Ripley, New York, the sum of two thousand one hundred dollars annually; and whenever the said Holbrook & Company, or their representatives, have or do pay the sum of twenty thousand nine hundred and ten dollars, and interest upon that amount at the rate of

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seven per cent. per annum, the said lessors agree to sell it to them, and the said lessors do promise that while the lessees and their representatives pay the rent, taxes, and insurance, and keep the same in good repair, they shall peaceably enjoy the same.

"The said lessees promising to pay the rent at the time aforesaid, and to quit and deliver up the same at the end of the term in as good order as the same now are.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year above written.

"SHEPHERD, WRIGHT & RIPLEY, [L. s.]

"SYLVANUS HOLBROOK & Co. [L. s.]

"Signed, sealed, and delivered in presence of

"PHILANDER HALE."

Ripley, one of the firm, testified that the object of the parties was to give and take security for their balance of account; that there was no consideration paid by them, and no change was made in their accounts, or the mode of keeping them, in consequence of the conveyance. That his firm instructed their agents at Worcester, Massachusetts, to obtain insurance on their interest in the property, and a policy was obtained at the Howard Office, in Lowell, for \$5,000, and another for the same sum at another office in Rome, N. Y.; that the plaintiffs did not know of the existence of either of these policies, so far as the witness knew or believed. That the amounts of these policies had been paid to his firm, and carried into a special account, the name of which he could not recollect, but it contained nothing but the premiums and the two sums of \$5,000 each; and that when they should settle with the plaintiffs, the balance of this account would be passed to their credit. The policy at the Howard Office was produced, and it appeared to have originally described the insured as mortgagees, but the word had been erased. In

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their representation, claim, and proof of loss, Shepherd, Wright & Ripley did not treat theirs as a mortgage interest, but as being the whole property, subject to a prior mortgage to a third person. Some other facts are noticed in the course of the opinion which was delivered by

CURTIS, J. The clause in the policy, which declares the interest of the insured therein not to be assignable, has no application to this case, unless the insured, by making such a transfer of the property as deprived them of their insurable interest therein, have worked "a termination of the interest of the insured in this policy" within the meaning of this clause; and the inquiry is, has there been such a termination? The first reason why their interest in the policy is not terminated, is found in the fact, that only a part of the property insured was conveyed to Shepherd, Wright & Ripley. The policy continued to cover so much as remained. But at the same time, if a part of the property insured was sold, it ceased thereby to be at the risk of the underwriters; and in adjusting the loss on the residue, the amount thus sold must be treated as if not put at risk, and the sum insured reduced proportionably; and as these plaintiffs claim to recover the whole amount insured in this policy, it becomes necessary to consider the effect of the conveyance they made. It was not a legal mortgage, for that requires a defeasance, which, on performance of the condition, would revert the legal title in the grantors. The indenture contains no such defeasance. But in equity, a conveyance of property, by way of security for a debt, is treated as a mortgage, whatever form the parties may have adopted to effect that object. In this case they have described, in words, a conditional sale, with a right of repurchase; but as it clearly appears that the sole consideration was a debt due from the grantors to the

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grantees, that the debt was not extinguished, and that the only object the parties had in view was to give and take security for that debt, and the interest which should accrue thereon, the conveyance could not be allowed to operate otherwise than as a mortgage between the parties. *Russell v. Southard et al.* 12 Howard, 139. There remained, therefore, in the plaintiffs the same insurable interest as before; for the property standing as security only for their debt, the loss to them by its destruction would be the same as if no such mortgage interest had been created. *Higginson v. Dall*, 13 Mass. R. 96; *Bartlett v. Waller*, 13 Mass. R. 267; *Gordon v. Massachusetts Fire and Marine Insurance Company*, 2 Pick. 249; *Lazarus v. Commonwealth Insurance Company*, 5 Pick. 76; S. C. 19 Pick. 81; *Gilbert v. North American Fire Insurance Company*, 23 Wend. 43; *Swift et al. v. Vermont Mutual Fire Insurance Company*, 18 Vermont R. 305; *Tittemore v. Same*, 20 Vermont R. 546.

Independent of this clause in the policy, and of other facts presently to be mentioned, it might have been necessary to submit to the jury the question, whether this change in the title was material to, and did work a change in the risk. In the case of the *Columbian Insurance Company v. Lawrence*, 2 Peters, 25, the Supreme Court held, that the difference between absolute legal title and a conditional equitable title might be material to the risk, and that it could not be declared, as a legal result, that one was in substance the same as the other, as a subject of insurance. But in this case the underwriters inquired, before making the insurance, whether the property was under mortgage, and for how much, and to whom, and whether the mortgagee had insurance; to these inquiries the insured replied, in writing, that "the property is mortgaged, and the mortgagee has no insurance, to our knowledge." Having been satisfied with this answer, and content to effect the policy

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without knowing the amount of the incumbrance, it would be difficult for them now to complain of the creation of an incumbrance on the property, the possession, and custody, and substantial interest of the insured remaining the same. But however this might be, I consider this express clause in the policy as governing the rights of both the parties in this particular. It provides only for a termination of the interest of the insured. Nothing short of that is to avoid the policy; and I do not think it is open to the insurer to say, that though less than this has occurred, the policy is void. If it was intended to have a change in the legal title, which worked no change in the insurable interest, affect the policy, they should not have declared that a termination of the interest of the assured should have that effect, and been silent as to all other changes of interest. I am of opinion that there is no defence to any part of the claim, under this clause of the policy.

Under the other clause of the policy it has been argued that the word "assigns" means any one who takes an interest in the property from the insured, and that as Shepherd, Wright & Ripley did take such an interest, and procured insurance on the property, and no notice was given to the defendants, this policy ceased and became void. I do not think this is the meaning of the word *assigns*, in this connection. This policy may be assigned to a purchaser of the property, with the assent of the underwriters. Being thus owner of the property and the policy, such purchaser would stand in place of the insured, and ought to be subjected to the same restraint as to subsequent insurance, intended to be placed on the latter by this clause. Yet it may well be doubted whether he would have been within the restriction, if not expressly named; and for this reason only, I consider, he was named. The word does not apply to an absolute purchaser of the

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property, who does not become the assignee of the policy with the assent of the office, for such a purchase, of itself, puts an end to the policy. It does not apply to one who acquires merely a lien, or other interest by way of mortgage, because he is not properly the assign of the insured, whose interest and property have not passed to him, but who, by virtue of his general property, has created a qualified and special interest only, and conveyed that. Moreover, unless the mortgagee insures for the account of the mortgagor, a case which will be presently noticed, insurance by him is not within the mischief intended to be guarded against, which is, such further insurance as would lessen the interest of the insured in the preservation of the property. If the insured can have no benefit from the subsequent insurance it can have no such effect, and he can have no benefit from it, if procured by the mortgagee for his own account and at his own expense.

We must, therefore, consider whether the insurance effected by Shepherd, Wright & Ripley was subsequent insurance effected "by the insured in this policy." And there are two events in which I am of opinion it is to be so treated.

In the first place, Shepherd, Wright & Ripley held the legal title. It was competent for them to cover, by insurance, not merely their own special interest in the property, but the property itself. Viewed as trustees, or as mortgagees, they might do so. *Lucena v. Craufurd*, 2 Bos. & Pull. N. R. 324; *Irving v. Richardson*, 2 B. & Ad. 193; S. C. 1 M. & Rob. 153; *Carruthers v. Sheddon*, 6 Taunt. 17.

If, in point of fact, they did cover the whole property, and were in any manner authorized by the plaintiffs to do so, then, in my judgment, there was subsequent insurance made by the plaintiffs; for it is wholly immaterial in whose name it was done. It is the thing, and not any

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particular form of doing it, which this clause was intended to guard against, and that thing is such subsequent insurance on the property as would lessen the interest of the insured in its preservation; and this includes all subsequent insurance, which, when recovered, will go to the benefit of the insured in the first policy. And so if the mortgagees did, in fact, cover their own special interest as mortgagees, and the mortgagors agreed to pay the expense of obtaining the insurance, then, although the mortgagees would have a lien on the insurance money, as security for their debt, yet the mortgagors could compel its application to the payment of the debt, and any surplus would belong to themselves. In these cases the subsequent insurance, being effected by the authority of the insured, for their benefit, and at their expense, must be deemed to be effected *by them*, within the meaning of this clause in the policy.

Whether this case comes within the interpretation of the policy, is a question of fact for the jury. There is nothing decisive in the instrument executed by the plaintiffs, and Shepherd, Wright & Ripley. What is there said concerning the payment for insurance, is introduced as a qualification of the covenant of the lessors. It may be evidence that there was some understanding between the parties on that subject, but in itself it only qualifies the lessors' covenant. So the testimony of Ripley, though it proves the insurance money is now intended to be credited hereafter to the plaintiffs, does not enable the Court to say that the insurance effected by them was for account of the plaintiffs. I shall submit to the jury the questions of fact, in substance as follows:—

If the insurance obtained by Shepherd, Wright & Ripley nominally covered the whole property, and not merely their interest in it, and they were in any manner authorized by the plaintiffs so to insure, or if there was any

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agreement between the plaintiffs and Shepherd, Wright & Ripley, that the former would pay the cost of insuring the special interest of Shepherd, Wright & Ripley, or any part of it, then there was subsequent insurance within the meaning of the policy, and the plaintiffs cannot recover.

Carpenter and Jenckes, for plaintiffs.

Ames and Bradley, for defendants.

IN THE MATTER OF WILLIAM STOVER.

Where a third person appears and defends a suit in admiralty, in behalf and in the absence of the party to the suit, he is to be treated as a party, and made liable, personally, for the fees of the Clerk of the Court, for services rendered in the cause at his request.

Where a decree is made, dismissing a libel in admiralty, "without costs to either party," it merely imports that the parties are not liable to each other for any costs, but does not affect the liability of a party to the Clerk for his fees for services rendered to such party.

CURTIS, J. The Clerk of this Court moves for an order of the Court on William Stover, that he pay the fees due to the Clerk for official services rendered by him to the claimants in certain cases in the admiralty. Many of the facts have been stated in giving the opinion upon Stover's petition. The other material facts are, that Stover, as agent for the owners of nine of these vessels, was admitted by the Court to claim them, and filed his claims as agent; that, instead of stipulating, with a surety, to pay the costs, he deposited, as security therefor, in each case, the sum of one hundred dollars; that, in his capacity of agent, he answered the libels; and that, after the decree was entered in this Court, dismissing the libels without costs, the sums deposited were paid out to him by the

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Clerk, under the belief that all the fees of the officers were to be paid by the government. Stover has filed an account between himself and the owners of the vessels, by which it appears that he had applied the moneys received from the clerk to pay counsel fees and expenses of the proceedings, including charges for his own services, travelling expenses, &c., amounting to \$442.64. He denies his personal liability for costs in any of these cases.

When a claim is to be made in the admiralty, the owner should do it, if practicable; but it is in the power of the Court to permit a representative of the owner to intervene, and claim and answer. *The Adeline & Cargo*, 9 Cranch, 244; *The Sally*, 1 Gall. 401; *The Lively*, 1 Gall. 315, 337. And this practice is sanctioned and provided for by the 26th Rule for the regulation of admiralty practice, adopted by the Supreme Court.

By the Roman law, any third person could appear, and take upon himself the defence of another's cause. He was, however, required to enter into an obligation, with sureties, to pay whatever should be adjudged against him; and he was considered as substitute, for all purposes, in place of the original party. *Lane v. Townsend*, Ware's R. 303. Under our practice, in suits *in rem*, third persons, duly authorized by the owners, may be admitted to claim and contest the suit; and when admitted, the rule of the Roman law is in part applied, *nemo alienæ rei, sine satisfactione, defensor idoneus intelligitur*. For the 26th rule, respecting claims by agents, requires them to file a stipulation, with sureties, in such sum as the Court shall direct, for the payment of all costs and expenses which shall be awarded against them by the final decree of the Court, or upon appeal, by the Appellate Court.

When a third person has thus intervened and claimed, he becomes the *dominus litis*, and is, for many purposes, to

be treated as a party. It is true, he acts for another, and may so act either in his own name, as agent, or in the name of his principal, as he thinks best; it is but a difference of form. *Houseman v. The Cargo of the North Carolina*, 15 Peters, 49. But in either way, he is a party on the record, contesting the suit, and controlling the defence, as a guardian or *prochein amy* does suits in equity and at the common law. It is manifest, also, that, ordinarily, he is the only party defendant, over whom the Court can have any control; for the reason for admitting an agent to claim, is, that the owner is out of the country, or resides at so great a distance as to render it impracticable for him to appear. This personal disability, arising from distance and absence, is the occasion for allowing a third person, duly authorized by the owner, to appear and defend for him, just as the personal disability of an infant or *feme covert* induces other courts to admit third persons to defend for them. But both courts of law and equity treat the third person, so intervening, as a party, liable to costs; and adjudge against him, not merely the fees of the officers of the court, for services rendered to him, but the whole costs of the party prevailing against him. Beames on Costs in Equity, 129. *Marnell v. Pickmore*, 2 Esp. 473; *Blood v. Harrington*, 8 Pick. 555. And in a court of law, he may be compelled to pay the costs by an order and an attachment, if the order be not obeyed. *Wilson v. McGee*, 2 A. K. Marsh. 601. Browne on Actions at Law, 290-91.

Here it is not a question whether he shall pay costs, but whether he shall be ordered to pay the fees of the Clerk for services performed for him as claimant. If the agent had complied with the 26th Rule, and stipulated, with sureties, to pay all such costs and expenses as should be awarded against him, both he and his sureties would then have been bound to pay these expenses. By force of a

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similar obligation as respects sureties, Mr. Justice Story held an indorser of a writ (2 Gall. R. 101,) liable for fees. And the question is, whether such a stipulation is essential to render such a claimant liable for fees for services rendered to him by the Clerk. I think it is not essential, and that an obligation on his part to pay such expenses, arises from his relation to the cause, and from his procuring the services to be rendered. It is argued, that an agent, who discloses his principals and acts for them, does not bind himself. This is true, in general. But if the credit be given to the agent, and not to the principal, the former is liable; and when the principal resides abroad, the credit is presumed to be given to the agent. Paley on Agency, by Lloyd, 373. Such a presumption may well arise in the case at bar. It springs from the fact that the agent who ordered the services is the *dominus litis*, is before the Court, a party on the record, and subject to its control; while the principal is not before the Court, and is out of the jurisdiction. To him, and not to his principal, the services must be deemed to be rendered, and the credit given; and upon this ground, he is personally responsible for the fees of the officers of the Court.

That the courts of the United States may compel a party to pay the fees of their officers for services rendered to him, by an order, to be enforced by an attachment, is settled. *Caldwell v. Jackson*, 7 Cranch, 276; *Bowne's Lessee v. Arbuckle et al.* Peters, C. C. R. 233; *Anon.* 2 Gall. 101.

It is argued, that such an order, in this case, would be in conflict with the decree of the Court in each of these cases, dismissing the libel "without costs to the libellant or claimant."

But this is founded on a misapprehension of the meaning of the decree; which is, simply, that neither party is to claim costs of the other. It has no reference to the

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claims of the Clerk, for his fees, upon the party for whom the services were rendered. It is wholly immaterial to the Clerk what order is made respecting costs. He has a right to be paid for his services by his employer. *Caldwell v. Jackson*, 7 Cranch, 276.

That the residue of the decree, directing the fees of the officers to be paid according to the act of February 28th, 1799, can have no bearing on the fees for services rendered to the claimants, has been already shown in disposing of Stover's petition.

In each of the nine cases, in which Stover made the claim, I shall have an order entered, that he pay the fees of the Clerk; but as their amounts have not been admitted by him, I shall, if he desires it, refer it to some member of the bar, to tax the fees and report them to the Court. If the Clerk's claim should be reduced by this proceeding, he must pay the expense of it; otherwise, it must be borne by the respondent.

In the other cases, I see no ground to charge Stover; and there has been no motion to charge any other person.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MAINE DISTRICT, SEPTEMBER TERM, 1852.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. ASHUR WARE, District Judge.

DAVID A. FISHER *vs.* HENRY H. BOODY *et al.*

Fraudulent misrepresentations by a stranger, not sufficient to rescind a deed of conveyance.

They may afford ground for relief, on account of mistake.

If a bill charges fraud, as the ground of relief, it must be proved; and the proof of other facts, though included in the charge, and sufficient, under some circumstances, to constitute a claim to relief under another head of equity, will not prevent the bill from being dismissed.

Though lapse of time be not pleaded as a bar, the judgment of the Court will be influenced by delay, not accounted for, when the bill seeks to rescind a sale.

Lying by, and acquiescence, may be sufficient to induce the Court to refuse to rescind a deed, though not pleaded as a bar.

If a bill to rescind a deed, is filed after a considerable lapse of time, and the exercise by the plaintiff of the powers of an owner over the property, so as to change its character or value materially, the bill must state sufficient reasons for the delay; and those reasons must be made out in proof.

THIS was a suit in equity, to rescind a sale and convey-

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ance of lands in the State of Maine. The substance of the pleadings and evidence are so fully stated in the opinion of the Court, that it is not necessary to recapitulate them.

CURTIS, J. This is a bill in equity, filed by David A. Fisher, a citizen of Massachusetts, against Henry H. Boody, Freeman Bradford, and Joseph Russell, citizens of Maine, to set aside a sale and conveyance of land, on the ground of fraud. The material allegations of the bill, upon which the claim to relief is rested, are, that the defendants, claiming to be the owners of a tract of land in the State of Maine, containing six thousand six hundred and ninety-four acres, known as the Bog Brook tract, authorized one Nathaniel Miller to make sale of it; that, on the seventh day of August, 1835, the complainant contracted with Miller to purchase one undivided eighth part thereof, at the rate of \$4.50 per acre; that, at or near the same time, other persons purchased five undivided eighth parts of the same land; that the complainant received from two of the defendants, Bradford and Russell, a written contract to convey to him what he thus purchased, and paid to them in cash the sum of \$1,255.12, and executed three promissory notes for the sum of \$836.67 each, one payable in one year, one in two years, and one in three years from the seventh day of August, 1835, and on the ninth day of November, 1835, received the deed of the defendants, purporting to convey to him, in fee-simple, one undivided eighth part of the land; that the defendant paid, at its maturity, the first of his notes, but the others are outstanding.

The bill further states, that Miller applied to him, in Boston, to purchase, representing that there were some gentlemen there from Maine, who had a choice piece of

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timber land, which they offered to sell at a great bargain ; that he intended to take part of it, and wished the complainant to take a share, and was desirous of making up a company of his friends, that they might operate on the land, get off timber from year to year, and make a great profit; that Miller exhibited a plan of the land, and stated that the lumber cut therefrom would come to navigation the first season; that, on the complainant's declining to purchase, he induced him to see one Borland, who, he said, had explored the land; and Borland informed the complainant that he had explored it, and found it one of the best tracts of timber land in Maine; that it would yield from four to six thousand feet of choice pine timber per acre, and other timber, such as spruce, juniper, and cedar, to make it average ten thousand feet per acre, and possessed all the advantages of locality and streams to enable those who purchased it to float the timber to market the first season after being cut; that it was a great bargain at \$5,50 per acre, and if it could be had at that price, he, Borland, was determined to go into it, to the extent of his ability. That the complainant still declining to purchase, Miller afterwards brought to him a person named Fogg; represented that Fogg had been sent down to explore the land, and he wished the complainant to hear his statement concerning it; whereupon Fogg stated, that the land would average from three and a half to four and a half thousand feet of choice pine timber per acre, and other timber in proportion; that the advantages for getting out lumber were good, and that timber cut therefrom could be floated down to a market the first season.

The bill charges that the land was of no value whatever as timber land, or for the purpose of lumbering, because about all the pine trees of sufficient size to be sawed into boards were wholly unsound and rotten, so much so,

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that the same could not be got out and manufactured into boards and sold at a sufficient price to pay the expense of the operation, and that this was known to the defendants; that when the defendants contracted to sell, they did not own the land, but only had a right to purchase it at not more than \$1,50 the acre, and they knew it was not worth even that price, and obtained this right to buy merely with a view of defrauding some unsuspecting person.

It further charges, that one Lewis L. Miller, having been authorized by the defendants to sell the land, applied to one Cheeseborough to purchase, and they having agreed to have it explored, Miller selected Fogg, and Cheeseborough selected Borland, and sent them down to the land on that business; that Borland and Fogg, in July, 1835, went on to the land, in company with the defendants, Bradford and Russell, and found it wholly worthless for purposes of lumbering; that the defendants, knowing that Borland and Fogg would so report, while coming from Portland to Boston with them in a steamboat, offered to each of them a deed of one undivided eighth part of the land, or a part of the profits, if they would report that the land was well covered with valuable timber, and was a great bargain at \$4.50 per acre, and if they would aid and assist in working off a part, or the whole, of the land at that price; that Borland and Fogg agreed to the proposal, Borland, however, reserving the right to acquaint Cheeseborough, secretly, of the worthlessness of the land, which he did, on seeing Cheeseborough; that the defendants gave Fogg a written promise to perform their nefarious contract, and that Borland and Fogg did report, falsely, to Miller, that they had found the land valuable, that it contained a large quantity of choice pine timber, and other valuable timber, and was a great bargain at \$4.50 per acre.

The bill further states, that when Borland and Fogg

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made the above-mentioned representations to the complainant, they were under the corrupt contract aforesaid, with the defendants; and that the complainant, being deluded and influenced by the false and delusive declarations and representations made by Nathaniel Miller, Borland, and Fogg, did, on the same day, conclude a bargain, as above-mentioned. There is another charge in the bill, concerning an incumbrance on the land, which will be noticed hereafter.

This is a succinct statement of the substance of the case made by the bill; and as there can be no doubt a sufficient case is stated, the first inquiry must be, whether it is made out in proof.

It should be observed, at the outset, that the bill does not aver that either of the defendants, in person, made any misrepresentation; the charge is, that the false representations, which misled the complainant, were made through Nathaniel Miller, Borland, and Fogg. We have, therefore, to ascertain from the evidence, not only what each of these persons represented to the complainant prior to his purchase, but also, whether at the times of such representations, each was so connected with the defendants as to render the defendants responsible for his acts in respect to this land. It has been urged, that if a third person, wholly unconnected with the defendants, made fraudulent representations, which induced the complainant to purchase, he is entitled to relief. I will not say a case for relief might not be made, resting on such a basis; but it must be on the ground of mistake, and must be brought within the principles applicable to that head of equity. There can be no responsibility for the fraud of a mere third person, acting without any authority from the defendants. And this bill states no case of mistake. It is true, that in summing up the grounds for rescinding the

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sale, this language occurs: "and although such gross and palpable fraud has been committed and practised upon your orator, or such gross and palpable mistakes mutually made and committed in regard to the value of said land and timber." But there is nothing in the bill to which these words concerning mistakes can be referred. No mutual mistake is anywhere described, and the averments throughout are of positive and intentional fraud and deception.

I assent to the rule laid down by the Lord Chancellor, in *Price v. Berrington*, (7 Eng. L. & E. R. 254,) that when a bill sets up a case of actual fraud, and makes that the ground of prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts, quite independent of the fraud, which might of themselves create a case under a distinct head of equity.

I return, therefore, to the inquiry, whether Nathaniel Miller, Borland, or Fogg, made to the plaintiff, before the purchase, the representations charged in the bill; and if so, whether he was so connected with the defendants, or either of them, as to give a title to relief on the ground of fraud.

And first, as to Nathaniel Miller. The only evidence of representations made by him comes from himself, as a witness for the plaintiff; and he fails to prove that he made the representations alleged in the bill. He admits that he urged the plaintiff to buy, told him he intended to purchase, and that he and some of his friends, who were to purchase the other parts of these lands, would join the defendant in operating, that is, getting off the timber. But he does not remember telling him it was a choice piece of timber land, or that it was a great bargain, or that great profits could be made. In short, he proves no material representation charged in the bill, even of the

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most general character, which was not true. It was urged by the plaintiff's counsel, that as he declares he said as much to the plaintiff as he did to others, and it is proved he made some more specific representations to others, and as it is apparent that, from the age of the witness and the lapse of time since the occurrences, his memory was not clear, the Court should presume that he did make to the plaintiff, the declarations charged in the bill. But having been carefully interrogated, by a set of very pointed, not to say very leading questions, upon each representation alleged in the bill, and having declared that he did not remember making them, it would be exceedingly dangerous to assume that his subsequent loose statement, that he said as much to the plaintiff as to others, is evidence that he made to the plaintiff the representations charged in the bill. If his memory was not sufficient to enable him to say whether he did or did not make those representations, it was not sufficient to enable him to prove the fact that he made them; and how much he said to others, is quite immaterial.

There is some ground laid by the bill for the inquiry, whether the plaintiff was not influenced by the belief that Miller was to pay, for his eighth of the land, as much as the plaintiff; but I am spared the necessity of investigating this, by the disclaimer of the plaintiff's counsel of all intention to impute to Doctor Miller, any intentional concealment of the fact, that a discount was to be made to him, and by the frank admission, which, indeed, Miller's testimony seems to render necessary, that his client has nothing to complain of in this particular.

I proceed, therefore, to examine, what relation Borland bore to these plaintiffs, at the time when the interview took place between him and the plaintiff and Miller, on the seventh day of August. This was the only interview

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with Borland, before the plaintiff's purchase, which was concluded on that day.

The bill charges, that Borland and Fogg, having been sent to explore these lands by Miller and Cheeseborough, who proposed to purchase them, were bribed by the defendants to make a false report to their employers, and to aid in selling the lands, by making misrepresentations. The answer of each defendant explicitly denies this charge and all connection with Borland, at any time prior to the thirteenth day of August; and they deny that Borland then had any agency for them, or either of them; but they admit that Russell and Bradford then agreed, that if he and his friends should take up the residue of the land, which Miller and his friends should not buy, at the rate of \$4.50 the acre, they would give him one eighth of the land.

So far as respects the denial of the bribery of Borland and Fogg, by the defendants, to make a false report to their employers, the answers are supported by the testimony of Fogg, taken by the plaintiff, who swears he knew nothing of it, and, so far as he was concerned, it was not true; and this very grave charge is not supported by any proof; nor is there evidence of any relation whatever between Borland and the defendants, prior to the time when the plaintiff made his purchase. That before the interview between himself and the plaintiff, Borland intended to have some connection with the sale of these lands, and hoped, as he declared, to make something out of it, is highly probable. That these plaintiffs had in any way employed him in reference thereto, before the plaintiff made his purchase, or knew that he had busied himself about the sale, or were at any time informed that he had made any representations to the plaintiff, does not appear.

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In respect to Fogg, the principal evidence in the cause comes from himself; he having been examined as a witness on the part of the plaintiff. His testimony, while it negatives, decidedly, any fraudulent purpose on the part either of himself or of any of the defendants, does clearly prove an employment, by Bradford, to give information to the plaintiff and others concerning these lands. And it shows, at the same time, a direct interest to promote the sale to the extent of one thousand dollars, which he was to receive, in case the sale should be effected for the price of \$4.50 the acre. He says there was a written contract between himself and Bradford and Russell to this effect, the manner of obtaining which he thus describes: "I invited Bradford, on the day of the date of the obligation, to walk with me; he talked on various subjects. I told him I expected he was making a great deal of money by this bargain, and I would stay, till it was decided whether they sold, if he would give me \$1,000. I told him I could say nothing more in praise of the land than I had already said; but I could blow up the bargain, and would, unless they gave me an obligation for \$1,000." A copy of an obligation to Fogg, signed by the defendants, Bradford and Russell, is put into the case by the plaintiff; but it purports to relate to a tract of land materially different in quantity from the one in question, not identified with it by any certain description, and the answers of Bradford and Russell, which in this respect are responsive to the bill, aver that it does not relate to this land.

I do not pause upon this; my present purpose being to declare how far there was an employment of Fogg, in behalf of the defendants, or any of them, in reference to these lands, so as to make them responsible for his representations.

Nathaniel Miller testifies that Fogg told the plaintiff the

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land had from three and a half to four and a half thousands of good pine, per acre. Fogg himself declares he made no representation he did not believe to be true; that he gave a correct account of the land, as near as he had been able to learn; that he considered the land a bargain at the price asked; and that he had made his report, and told all he knew about the land, before he was employed by the vendor.

It is necessary, to a correct understanding of the case, to state that the gravamen of the plaintiff's complaint does not respect either the soil, or local position, or even the quantity of timber on the land; but its quality. As to the quantity of timber, though there is some conflict of opinion among the practical lumbermen who have worked on the tract, yet the general result of the evidence is, that the quantity was large; and the plaintiff's counsel explicitly declared, at the bar, that he did not make a question on that point; and the bill states, in terms, that it was the unsound and rotten condition of the pine timber which rendered the land of no value, and that it was in that particular the plaintiff was and continued to be deceived, even for the space of two years after he made his purchase. Indeed, it is only upon this ground the bill can stand, because during the years 1835-36, and 1836-37, the plaintiff and his associates had sufficient means of knowledge of the quantity of timber, and the bill alleges no concealment by the defendants in this particular; and as the plaintiff and his associates continued to operate on the land during both those seasons, and this bill was not filed until August, 1844, it would be impossible to maintain the suit upon the ground of a deficiency in the quantity of timber. The real cause of complaint is, that the quantity of sound merchantable pine timber was not equal to what was represented.

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Upon this point, the testimony of Miller and Fogg, taken together, is, that Fogg represented there was from three and a half to four and a half thousand of good pine per acre, and that he believed what he said to be true. In point of fact, I think the evidence shows this representation was not substantially correct; a considerable part of the pine timber then standing on the land being more or less decayed.

But it is a very material inquiry here, whether this assertion by Fogg was of a matter of fact, or a matter of opinion merely. An honest but mistaken assertion of a fact, to another's loss and his own gain, by a vendor or his agent, may be a constructive fraud; but this principle does not extend to assertions of what are known to both parties to be matters of opinion only. And an assertion may appear to be a matter of opinion, either from its being made in that form, or from the very nature of the thing asserted. It is shown, by the evidence in this case, and I think is so obvious, that it must be taken to have been known to the plaintiff, that a representation of the quantity of sound pine timber standing on the land, was of a matter of opinion. Many persons, of practical experience in such matters, and better acquainted with these lands than one merely sent to make an exploration could be supposed to be, have testified in this cause on this subject. They differ very widely. The result may be summed up in the words of one of the witnesses, who says some lumbermen thought the best and most valuable timber had been cut, and others thought differently. The very representation relied on showed it to be somewhat loose and conjectural; three and a half to four and a half thousand feet per acre, does not convey the idea of a precise statement of a matter of fact. According to the bill, the plaintiff had just before been told by the other explorer,

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Borland, that the land would yield from four to six thousand feet of choice pine per acre. Such a wide discrepancy between the two persons employed to explore, and to whom the plaintiff resorted for information, must at least have apprised him that they were speaking from loose estimates. It must be observed, that the assertion relates to the quantity of sound timber. This involves, not merely the question how much pine timber was on the land, but what part was sound, and what unsound. The latter is very difficult to be determined, with any approach towards precision, by a mere exploration of the land. No doubt, some estimate may be formed; but the nature of the thing, as well as the very considerable discrepancies among the witnesses, show it to be purely a matter of opinion, upon which honest and skilful men will greatly differ.

I have examined the substantial allegations in the bill respecting the misrepresentations relied on, in order to see what their character was; whether they are supported by the proofs, and how far the defendants are responsible therefor. There are many allegations concerning the representations made to others, which are material only as tending to show, if proved, a general fraudulent purpose on the part of one or more of the defendants, and of Borland. But inasmuch as no representations by the defendants themselves are alleged, and as Borland is not shown to have been their agent, or to have been in any way connected with them before the plaintiff purchased, I have not thought it necessary to detail them. There are also circumstances in the case tending to show, that some of these transactions, with others than the plaintiff, were not conducted fairly by all who were concerned in them. It is very extraordinary that one eighth of the whole tract should have been given to Borland. It is not quite clear

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to my mind, that the promise to Fogg referred to the sale of another tract of land; it is proved, I think, that Borland deluded some of the other parties; but the great difficulty in the plaintiff's case is, that he does not connect himself with these circumstances, and show himself to have been deluded into making this purchase, by such evidence as will enable me to set aside this conveyance after the lapse of so much time, and after the acquiescence by him which appears; all fraud being explicitly denied by the answers.

This sale was made in August, 1835, and nine years elapsed before the bill was filed. It is true, no statute of limitations is pleaded, and the lapse of time is not specifically relied on in the answer. But I apprehend the true doctrine on this subject is given by Lord Brougham, in *Irvin et al. v. Kirkpatrick*, (3 Eng. L. & E. R. 24,) decided in the House of Lords in 1851. "A party, say they, meaning to avail himself of the topic of time, must do it by a plea, and must succeed altogether, or, I suppose they mean to add, fail altogether. I cannot go so far as that. I, too, say that a Court of Equity will overleap the barrier of time to get at the fraudulent practice. I, too, say the length of time which has elapsed is not a bar to this suit. But that it should not enter into our consideration; that it is to be wholly dismissed; that as a suggestion, it is to have no effect in moulding, as it were, in influencing the frame of mind, in which we shall be when we are to consider the rest of the case, either as a jury upon the facts, or as judges upon the law, — to that proposition I cannot assent. Am I to dismiss that fact from my mind, and deal dryly with all the facts and all the law of this case exactly as if it had occurred three or four years, or as many months before the action was brought? I cannot go that length. On the contrary, I hold it is most material," &c.

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This distinction, between a positive bar from lapse of time, and that lying by and acquiescence, which will cause a Court of Equity to look upon the proofs with some distrust, and to refuse relief unless the delay and acquiescence are satisfactorily accounted for, I consider a most important principle, necessary to be constantly kept in view in wielding the transcendent powers of a Court of Equity ; and it rests upon ample authority, though, in my judgment, it has sometimes not been sufficiently regarded. *Prevost v. Gratz*, 6 Wheat. 481; *Elmendorf v. Taylor*, 10 Wheat. 153; *Piatt v. Vattier*, 9 Peters, 416; *Stearns v. Paige*, 1 Story's R. 217; *Wagner v. Baird*, 7 How. 234; 1 Mad. Ch. 99; *Lawrence v. Blake*, 8 Clark & Fin. 504; *Hough v. Richardson*, 3 Story's R. 659.

The plaintiff seems to have been quite aware of this difficulty, and has introduced into his bill some allegations designed to avoid it. Their substance is, that by the fraudulent practices of some of the defendants, and of other persons having a common interest with them, the plaintiff and his associates were prevented from discovering the decayed state of the timber until the summer of 1837; and the bill avers, "that he made no discovery of the frauds practised upon him until the fifth day of January, 1839; at which time your orator first discovered and was satisfied, and felt himself able to prove, the many charges set forth in this, his bill of complaint, and has to this time delayed prosecuting the same on account of the poverty the said frauds of the defendants brought upon him, and the hope that his appeals to their justice and equity would save him from the vexation, trouble, and expense of an appeal to this Court for redress."

This, taken in connection with the facts in the cause, is far from being satisfactory to my mind. It appears that, in the summer of 1837, a large quantity of this tim-

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ber, taken from the land during the two preceding years by the plaintiff and his associates, was actually sawed into boards; and it is the result of that operation which is now relied on, as showing the worthlessness of the timber. If the plaintiff did not then know that its quality fell so far short of the representations, as to amount to a fraud, he was either guilty of gross neglect, or there was not such a fraud as he relies on.

In respect to his first feeling himself able to prove all his charges of fraud in January, 1839, no particular sources of evidence, then first discovered, being in any way indicated by the bill, or appearing in the proof, I can allow no weight to it. Such vague allegations are too easily made to be entitled to any effect. If, at that time, the plaintiff made any particular discovery, the bill should have stated what it was, and why it was not before known, and how it was discovered. *Stearns v. Paige*, 7 Howard, 829. That the delay has arisen from the poverty of the plaintiff, brought upon him by the frauds of the defendants, is not shown. He has paid the plaintiffs less than twenty-two hundred dollars; it does not appear that he lost any considerable sum in the lumbering operations; the evidence tends to show that, in 1835, he was worth about ten thousand dollars, and that he was engaged in other eastern land speculations. His letter to the plaintiff, Boody, written in January, 1838, though it shows he was in want of money, does not indicate poverty; and there is no evidence that this pretence in the bill is well founded.

It is not by a statement of imaginary difficulties, or unreal obstacles, that delay is to be accounted for. In this case, I am not satisfied that any thing more substantial is shown.

But this case contains facts still more formidable to the plaintiff's claim than mere delay. From 1837 down to

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the filing of the bill, lumbering operations have been carried on upon these lands by practical lumbermen, and so large quantities of timber removed, as to effect very materially the value of the land. During this time it has also been injured by fire. In January, 1838, after the timber, taken off by the plaintiff and his associates, had been actually sawed into boards, the plaintiff wrote a long letter to Boody, in which he recognizes his notes as due, and gives assurances of their being paid. And though he does not appear to have been concerned in the profits of the subsequent operation on the land, yet, as late as 1840, he offered to Purrington, one of the witnesses, a permit to cut timber thereon.

Here is an amount and kind of acquiescence, and a consequent change in the value of the property, which render the Court, through the fault of the plaintiff, unable to restore the parties to their original condition.

There is one other part of the bill which must be adverted to. It is the claim for relief, by reason of an incumbrance on that part of the land purchased of Russell. There can be no doubt that a fraudulent concealment of incumbrances on the land sold may lay the foundation for relief, by a rescission of the sale, even after the execution of a deed of conveyance containing covenants, upon which a remedy might be had at law. But I apprehend that a very different case from the present must be made. The answer of Russell admits that the land was represented, at the time of the sale, to be unincumbered, and that it was his intention to have had an unincumbered title made by the holder of that title; but that the plaintiff, with a full knowledge of the state of the title, proposed to accept a deed from him, and to rely on his removing the incumbrance, which he afterwards did, by paying it off, and taking a discharge of the mortgage. There is nothing in

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the proofs sufficient to control this ; and it is in part, supported by the record evidence. The plaintiff has not suffered any loss, by reason of the existence of the mortgage ; nor does he show that he is now exposed to any. I cannot, for this cause, set aside a conveyance made seventeen years ago.

I have not adverted particularly to some more general grounds of complaint contained in the bill. It is certainly true that the defendants were not the owners of the land when the sale was made, having only a right to purchase it on certain terms. It is true, also, that the price at which they sold, was at a very large advance upon that which they were to pay. I am satisfied that a prudent man, who knew the amount and condition of the timber standing on the land, would not have agreed to purchase at the rate of four dollars and fifty cents per acre. But I am not satisfied, that the defendants knew the condition of the timber, nor that the land was worthless for lumbering operations. The fact that practical lumbermen have operated upon it, so many years since 1835, is quite decisive on this point. These, and some other circumstances, would have been entitled to a more rigid scrutiny, if the transaction were recent, and the plaintiff had approached nearer, to making satisfactory proof of the more specific charges of fraud in his bill. But, independent of the fraudulent concealment, by the defendants, of the state of the timber, alleged, but not to my satisfaction proved, they do not of themselves afford ground for relief, by reason of fraud ; and I have, therefore, not thought it necessary more particularly to allude to them.

For similar reasons, I have not spoken of some of the points made in behalf of the defendants, and particularly of the defendant Boody. But it may be proper to state, what was conceded by the plaintiff's counsel, that his

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connection with these transactions was, if any, a mere legal relation, he not having, at any time, actually participated in them.

The bill is to be dismissed; and as to costs, I shall follow, what I understand to be a settled rule, that if a bill charges fraud, which is not proved, and the bill is dismissed, the plaintiff must pay costs.

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An attachment of all the right, title, and interest of the defendant in and to any lands in the county, binds his right of redemption of mortgaged land, and not the fee, and if the execution be extended on the land, the title dates only from the seizure on the execution.

By the law of Maine a mortgagee may extend on the land mortgaged, an execution issuing on a judgment for the debt secured by the mortgage.

If an officer's return can be fairly construed so as to be sufficient in law, it is the duty of the Court so to construe it.

THIS was a bill in equity to redeem a mortgage. The respondents denied the title of the complainant to redeem. It appeared that the complainant's title was derived from Mr. C. S. Daveis, who having caused the equity of redemption of the mortgagor to be attached on an original writ, extended his execution on the land within thirty days after the date of his judgment. The respondents claimed under the President, Directors and Company of the Portland Bank, who being the assignees of a note and the mortgage sought to be redeemed, also caused the right, title, and interest of the mortgagor, in any land in the county, to be attached on an original writ founded on the mortgage debt, and extended their execution on part of the land mortgaged, and other lands of the mortgagor. The at-

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tachment in behalf of the Bank was prior to that in behalf of Mr. Daveis, but the latter preceded the extent of the execution of the Bank. Some other facts are sufficiently adverted to, and stated in the opinion of the Court.

CURTIS, J. The first and most important question in this case is, whether the execution in the name of the Portland Bank could lawfully be levied on part of the land embraced in the mortgage given to secure the same debt for which the execution issued. Another question was made and argued at the bar, whether the attachment in behalf of the Bank on the original writ was valid. I do not deem it necessary to decide this question. The only interest which the debtor had in this land, when both the attachment in behalf of the Bank, and that in behalf of Mr. Daveis, was made, was an equity of redemption, and neither attachment could bind any thing besides that equity. But neither the Bank nor Mr. Daveis caused an execution to be levied on this equity of redemption pursuant to the attachment. An equity of redemption, as such, can be levied on, only by a sale at auction, in the manner prescribed by the Statute. *Warren v. Childs*, 11 Mass. R. 222; *Aiken v. Medex*, 15 Maine R. 157. This was not done by the Bank at all, nor by Mr. Daveis, until after the expiration of thirty days from the date of his judgment. Each party attached the equity of redemption, and extended the execution on the fee. This may be done, and be good as against the debtor and those claiming under him subsequently to the extent, but such extent does not relate back to the attachment of the equity, except in one case specially provided for in the Statute: R. S. of 1821, c. 60, s. 1—"When any right in equity of redeeming real estate which is mortgaged, shall be attached on mesne process, and pending such attachment such mortgaged real

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estate shall be redeemed by the mortgagor, the attaching creditor shall have the same lien on the said estate as though the attachment had been of the fee, and execution may be levied thereon accordingly."

This clearly implies what, independent of this provision, would seem to be clear, that in other cases an extent cannot be made on the land as if the attachment had been of the fee, when it was of the equity of redemption only; and the case stands clear of the attachments, and must be decided upon a comparison of the titles gained by the extents. That of the Bank was prior in time, and, if valid, must prevail. The objection made to it is, that the debt, for which the execution issued, was secured by a mortgage covering the land levied upon. Whether this objection be valid depends upon the local law of Maine. The argument is that this law has given to the mortgagor three years, after entry for condition broken, to redeem the land; that if the creditor can extend his execution on the land he may thereby cut down the term of redemption to one year from the date of the extent, which may be, as in this case it was, less than three years from the breach of the condition; and that by taking a mortgage, the creditor does impliedly agree, that in respect to that debt, the debtor shall have a right of redemption for three years, from the entry for breach of condition.

This argument has had the sanction of high authority, (*Atkins v. Sawyer*, 1 Pick. 351,) but, in my mind, as applied to an extent on the land, it is open to much question. The statute which gives this right of redemption is limited to a particular class of cases. There is no general and positive provision of statute law, that mortgagors shall have a right to redeem, for three years after the debt becomes payable. The design of the statute was to regulate foreclosures, by entry for condition broken, and it merely

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provides, that when the mortgagee shall have obtained actual possession for condition broken, the mortgagor may redeem at any time within three years next after such possession obtained, and not afterwards. But the same system of statute law enables every judgment creditor, to levy his execution on the land of his debtor, and just as clearly grants this right to the creditor, as the other law grants the right of redemption to the debtor. Both must stand and be effectual, if possible. The legislature, having made no exception out of its grant of remedy to the creditor, none can be implied by the Court, unless clearly demanded by some other provision of law; and if that other provision is applicable only to a different remedy by foreclosure, and may have a legitimate effect according to its terms and apparent meaning, without interfering with other remedies, I should hesitate long, before I resorted to it, to create a limitation upon the right of creditors, to use the ordinary process of the law.

To say that the creditor has agreed that the debtor may have three years to redeem, is to assume the very point in controversy. He has placed himself in a position, in which, if he seeks to foreclose the right to redeem, three years are required to complete that remedy, but if he extend his execution on the land, only one year is required to give him an absolute title. And the debtor may as well be supposed to have agreed to the latter, as the creditor to the former. Besides, this supposed agreement would be inconsistent with the right of the creditor to seize other property of the debtor on the execution, for the debt secured by the mortgage; because this proceeding compels a redemption within the term of three years. *Cushing v. Hurd*, 4 Pick. 253. The truth seems to me to be, that without resorting to any implied agreement, the debtor, by giving the mortgage, subjects his land to all such

rights as the law 'confers on mortgagees ; and by giving his promissory note for the mortgage debt, he subjects his person and property, generally, to the remedies which the law affords to compel its payment at maturity.

Whether one remedy or the other will most speedily extinguish the equity of redemption, must depend upon the course of the courts, and the time required to obtain a judgment ; in which it is by no means a case beyond experience, to obtain a judgment at law, levy the execution, and wait a year for the right of redemption from such levy to expire, would prove quite as tardy as a foreclosure by possession.

I should feel great difficulty, therefore, acting on my own views of the law, in assenting to the doctrine of *Atkins v. Sawyer*, as applied to an extent on the land mortgaged. I should yield to its authority in adjudicating upon titles in Massachusetts, although the same learned Court, which decided that case, refused, in *Buck v. Ingersoll*, 11 Metcalf R. 226, to apply the rule to personal property. But sitting in Maine, to try a title to real property in that State, I assent to the rule, which I think fairly deducible from the case of *Porter v. King*, 1 Greenl. R. 297. Some of the comments of the complainant's counsel on that case are well founded ; but, at the same time it is true, that the question whether an extent on part of the land mortgaged, to satisfy, in part, the mortgage debt, was valid, and effectual to give the mortgagee an absolute title at the expiration of one year, was made and argued by counsel, and decided by the Court. The case called for a decision of this question. The mortgagee having sold the land thus extended on, for a larger sum than the appraised value at which it was set off to him, the mortgagor claimed that he should account for that larger sum, upon the ground that the relation of the parties was not changed by the extent,

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nothing having passed thereby. To this it was replied, that the relations of the parties was changed by the extent, and that this land passed in the same manner as if the land levied on, had not been embraced in the mortgage; and the Court said: "That the land having been regularly set off to the creditor at an appraised value, according to the forms of law, his title to it became perfect, after the lapse of a year from the extent. The mortgage was intended, merely to increase the certainty of payment of the debt, not to place any part of the debtor's estate out of the reach of the common and ordinary process of the law."

It is observable, also, that the Portland Bank was the indorsee of the notes on which their judgment was recovered. In *Crane v. March*, 4 Pick. R. 131, it was held, that the indorsee of a note, secured by mortgage, might cause the equity of redemption to be attached, and sold on execution. In that case a third person held the mortgage, as a trustee, for the indorsee; here the mortgage, as well as the notes, were assigned to the Bank; but this seems to me, not a distinction of any real importance.

This objection to the respondent's title must therefore be overruled. Two other objections are taken to the form of the levy. The first is, that the statute, in force when the execution was extended, required the appraisers to set out the land by metes and bounds, and they have only described the land generally, and then given a reference to a deed recorded in the Registry of Deeds for the county.

Whatever might have been thought of this objection if the question were new, I am of opinion that it is foreclosed by the decision of the Supreme Court of Massachusetts, in *Boylston v. Carver*, 11 Mass. R. 515, decided in 1814, while Maine was a part of that State. When, after the separation of this State, it enacted the same

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statute here, I must consider that it was intended it should be expounded here according to the construction which had already been given to it.

The remaining question arises upon the officer's return on the execution. The part objected to is as follows:—

"I have this day levied the within execution thereon, and I have delivered seisin and possession of said estate to the said attorneys and assignees of the creditors, John Warren and Nathaniel Warren; to have and to hold the same to them and to their heirs and assigns forever, in full satisfaction of this execution, and all fees and charges of levying the same; which charges amount to eighty-four dollars and eighteen cents. I therefore return this execution satisfied in full. JERE. MARTIN, *Deputy-Sheriff.*"

"May 16, 1840. Received of Jeremiah Martin, Deputy-Sheriff, seisin and possession of the above described premises, in full satisfaction of the within execution, and the charges of levying the same. JOHN WARREN,

NATHANIEL WARREN,

*Attorneys and Assignees of the within named creditors,
but for our own use and benefit."*

It is a fair presumption that the officer intended to make a legal extent and return, and therefore if his language fairly admits of a construction which will make the return legal and sufficient, it should be so construed. There is no doubt John and Henry Warren were duly authorized to receive seisin as attorneys for the creditors. The return of the officer declares he delivered seisin of the estate "to the said attorneys and assignees of the creditors." If they were attorneys, it is of no importance that they were also assignees, and mentioning that has no effect. The return proceeds "to have and to hold the same to them and their heirs and assigns forever, in full satisfaction of this execution." The last antecedent to

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"them" is "John and Nathaniel Warren," but the context shows they were not the persons meant, because the holding is to be in full satisfaction of the execution, and this could only be by the execution creditors having the land; setting it off to the attorneys would not satisfy the execution.

I think that, taking the whole return together, the meaning is, that the land was set off to the execution creditors, and not to the attorneys, and this title of the creditors was subsequently conveyed to the defendants. Some objection was made to the receipt of seisin, the attorneys declaring therein, that it was accepted by them as attorneys and assignees of the creditors, but for their own use. But if they acted as attorneys the statute was complied with, and whether they were also assignees, and intended to hold the land to their own use, were matters between them and the creditors, and did not affect the validity of the proceedings. There is no inconsistency in their acting as attorneys and being at the same time the equitable owners of the land.

The result is that the defendants' title must prevail, and the bill must be dismissed with costs.

Barnes, and *E. H. Daveis*, (with whom was *W. P. Fessenden*) for the complainant.

Shepley, for the respondents.

J. WINGATE CARR, ASSIGNEE IN BANKRUPTCY OF WILLIAM SMITH, *vs.* STEPHEN HILTON *et al.*

Lands held for a bankrupt, upon a trust which resulted from the payment of the entire consideration by the bankrupt, before the Bankrupt Act was passed, belong to the assignee.

If such trust was created to conceal the property from creditors, this might prevent a court of equity from lending its aid to the bankrupt to enforce the trust, but the assignee may enforce it, for the benefit of creditors.

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Lands conveyed to a third person by the bankrupt, without any consideration, upon a secret parol trust in his favor, for the purpose of defrauding creditors, pass to the assignee, although the conveyances were made before the passage of the Bankrupt Act.

Under the eighth section of the Bankrupt Act, the cause of action in such a case does not accrue, until the fraud is discovered.

The repeal of the Bankrupt Act does not prevent an assignee from instituting suits to reduce the property of the bankrupt to possession.

THIS case is fully stated in the opinion of the Court, by

CURTIS, J. J. Wingate Carr, as assignee in bankruptcy of William Smith, has filed his bill in equity, stating that Smith was decreed a bankrupt, and the complainant appointed his assignee, in February, 1843; that the amount of debts sworn to by the bankrupt was large, while the assets disclosed by him were not sufficient to pay the charges of the bankruptcy; that at different dates, between the years 1834 and 1840, inclusive, the bankrupt being insolvent, for the purpose of concealing his property from his creditors, made sundry conveyances thereof to the defendant, and facts are stated showing that the defendant must have participated in this fraudulent intent. The bill further states that the bankrupt exchanged some property for a farm in Newport, in the District of Maine, and instead of taking the title to himself, caused the same to be conveyed to the defendant, and his brother since deceased; that the latter has conveyed his title to Henry Warren Esquire, a counsellor of this Court, who is made a party to the bill, and who is ready to perform all such orders and decrees as the Court may make in the premises, such being the purpose for which he holds that title; that the title to the said farm was thus vested in the defendant and his brother, to conceal the property from the creditors of the bankrupt, but the bill does not aver that the defendant was a party to this fraud, or had knowledge that the legal title was vested in him.

The bill further states that these frauds of the bankrupt were unknown to the complainant until within two years before the filing of the bill, and it details when and how the frauds were discovered by him.

The defendant has demurred to the bill, and has assigned, orally, four causes of demurrer, which must be separately considered.

The first is, that these transactions, being all prior to the passage of the Bankrupt Act, and there being no averment that either of them was in contemplation of bankruptcy, or of the passage of a bankrupt law, no title passed to the assignee, and he cannot sustain this bill.

In passing on this objection, it is necessary to distinguish the case of the Newport farm from the other transactions. The legal title to these lands was never in the bankrupt, but the whole consideration having moved from him, a trust resulted to him by operation of law, and he was the equitable owner of the lands, at the date of the decree in bankruptcy.

The third section of the act, (5 Stat. at Large, 442,) enacted that all property and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt, except household furniture, &c., not exceeding in value three hundred dollars, shall, by mere operation of the decree, be divested out of the bankrupt, and vested in the assignee. There can be no doubt that the equitable ownership of lands, by reason of a resulting trust, is a right of property, within the meaning of this clause. But it is argued that the section only provides that the assignee shall have the same rights, titles, powers, and authority to sue for the same that the bankrupt had before, or at the time of his being declared a bankrupt; and that the bankrupt himself could not have had the aid of a Court of Equity, to enforce a trust created for the

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purpose of defrauding his creditors. Whether a Court of Equity would permit the trustee to set up the fraud as a bar to a bill by the *cestui que trust*, it is not necessary in this case to determine. On the authority of *Muckleston v. Brown*, 6 Ves. 68, *Ottley v. Browne*, 1 B. & B. 360, and *Chaplin v. Chaplin*, 3 P. Will. 233, I should hold the affirmative; this, however, would not rest upon any want of title in the bankrupt, but upon a very different ground, which will be presently stated. But there is a very broad distinction between a bill by the bankrupt, the author of the fraud, and one by the assignee, who seeks to recover the property, for the benefit of the very interest sought to be defrauded. The ground for refusing relief to the author of the fraud is a principle of public policy, which forbids the Court to be ancillary to a plan for evading the law and depriving creditors of their just and legal rights. But where the assignee sues, the case is reversed; to grant the relief, is to act in accordance with these rights of creditors, and in opposition to the contemplated fraud, while to refuse it would be to aid in its perpetration.

Lord Redesdale, in *Joy v. Campbell*, 1 Sch. & Lef. 328, held, that legatees and creditors were entitled to relief, and this distinction between the author of the fraud and one claiming through him, had previously been taken by Lord Eldon, in *Muckleston v. Brown*. See, also, *Fairbanks v. Blackington*, 9 Pick. 93; *Martin v. Root*, 17 Mass. R. 228; *Holland v. Cruft*, 20 Pick. R. 321. I am clearly of opinion, therefore, that, as respects these lands in Newport, the assignee may maintain this bill; and as the demurrer is to the whole bill, it follows that so far as respects the objection to the assignee's title, it must be overruled. But as the question concerning his title to the other lands must at some time be determined, and has been fully argued, I think it proper to express my opinion thereon.

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The argument against the title is, that there are no words in the act sufficient to pass to the assignee, the title to property conveyed by the bankrupt, to defraud his creditors prior to the passage of the bankrupt act. On examining the law, it will be found there are no express words in it passing to the assignee property conveyed by the bankrupt to defraud creditors, at any time, unless made in contemplation of bankruptcy, which is now settled to mean something more than insolvency. *Buckingham v. McLean*, 13 How. 150.

The two great objects of the Bankrupt Law were, the equal distribution of all the property of the debtor among those justly entitled to it, and the relief of honest debtors, who should conform to its provisions, from the burden of their debts. It is a notorious fact that the pecuniary state of the country at the time, was the great and leading inducement to the passage of the law, and that it was expected and intended to operate, as in fact it did operate, upon a vast number of cases of persons who had previously become insolvent. To hold that no property, fraudulently conveyed by any of these persons, before the date of the law, could be distributed under it, would be so much in conflict with one of its great purposes, that I should come very reluctantly to that conclusion. It does not seem to me necessary to do so. A fraudulent conveyance is no effectual conveyance, as against the interest intended to be defrauded. This interest the assignee represents, so far as respects all creditors who prove their claims. They can have no remedy which will reach property fraudulently conveyed, except through the assignee, because they can sustain no suit against the debtor. Their remedies are absorbed in the great and comprehensive remedy under the commission, by virtue of which the assignee is to collect and distribute among them, the property of their

debtor to which they are justly and legally entitled. The case of the assignee is, therefore, that the lands in question are the property of the debtor, and that he prays the aid of this Court to remove an apparent cloud upon the title, which, though void, interferes with the discharge of his official duty. In this view, the case is within the express terms of the third section of the Act, and it is the view taken in *Sands v. Codwise*, 4 Johns. R. 536, especially by Chief Justice Spenser, and Mr. Justice Kent. In my judgment it is a sound view. See, also, *Martin v. Root*, 17 Mass. R. 228, and *Holland v. Cruft*, 20 Pick. 321. But here, also, it is urged, that the subsequent language of this section proves that the words, "all the property and rights of property," &c., were not intended to apply to any property which the bankrupt himself would not have had a title to recover, if he had not been decreed a bankrupt.

It is not easily apparent, what was intended by this clause. Its language is, "and the assignee, so appointed, shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, as fully, to all intents and purposes, as if the same were vested in, or might be exercised by, such bankrupt, before, or at the time of his bankruptcy, declared as aforesaid." The general idea here conveyed, is, succession to the bankrupt;—though somewhat obscure, this general idea is sufficiently conveyed; but one difficult inquiry is—succession to the rights belonging to the bankrupt, at what time? The answer of the statute is, "before or at the time of his bankruptcy;" that is, at any time before the instant when the rights and powers of the assignee became vested. I must admit the difficulty of discerning the precise meaning and effect of this clause; but I do not see that it is sufficient to control what, I think, is one of the great objects of the law. If

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the assignee is vested with the same powers which the bankrupt had *before, or at the time of* his bankruptcy, he has a right to the interposition of this Court, in this case; for there was a time *before* the bankruptcy, when the title of the bankrupt was perfect. Yet it cannot be supposed that in a clause, the general idea of which is succession, the legislature intended to refer to any and all past rights which had at any time existed. What then is the meaning of the clause, "before, or at the time of his bankruptcy," as descriptive of the period of time to which reference is to be had, in considering what rights and powers this clause confers on the assignee? This is a question of great difficulty, and, in my judgment, the only safe means of solving it are found in the general purpose and object of the law. This general purpose requires that property, which belonged to the bankrupt, at the time of the bankruptcy, should be distributed among his creditors who prove their claims; it further requires that property, attempted to be conveyed by him to defraud those creditors, should be treated as his property; if it be treated as the property of the bankrupt, the assignee, by virtue of his title, and as the trustee of the creditors, has a right to the aid of this Court in this case. Cases might occur, and may be supposed, in which the possession of the title of the bankrupt might not be, of itself, sufficient. Without more, it would not enable the assignee to sue in his own name, upon any *chose in action*, not negotiable, nor to maintain a real action upon a disseisin, or for a mere right of the bankrupt. In this view, it may be considered as not designed to limit, or give a construction to the preceding clause, which vests the property, but as superadding thereto some other rights and powers, which would not otherwise have attached to its ownership. This, according to the best opinion I can form, is the real purpose and

effect of the clause, and in this aspect it does not interfere with the right of the plaintiff to maintain this bill.

In my opinion, the property fraudulently conveyed, is to be deemed property of the bankrupt, and was, by the decree, vested in the assignee. This enables him to maintain the bill. He has no occasion to resort to the subsequent clause, for any enlargement of his powers, and the design of that clause was not to deprive the assignee, of rights which attach to the ownership of the property, in the capacity in which he holds it, but to enlarge his powers and confer rights upon him which, on the ordinary principles of law, do not belong to a mere voluntary assignee.

The next cause of demurrer is the bar, arising from the last clause of the eighth section of the Bankrupt Act, which is as follows: "No suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of action shall first have accrued."

The bill avers that the fraud, which is the present cause of action, was discovered within two years before the filing of the bill. Long before the statute was enacted, the same words, in other statutes of limitations, had received a construction, both in England and America, at law and in equity, and in the courts of the United States as well as in other tribunals. The cases in the English Chancery are very numerous, and it is not necessary to detail them. They are collected by Mr. Lewin, in his *Treatise on Trusts*, p. 616. In this country, also, there are decisions in most of the courts of the last resort, one of the earliest of which is *First Massachusetts Turnpike Corp. v. Field*, 3 Mass. R. 201,

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followed by *Homer v. Fish*, 1 Pick. 435, and *Welles v. Fish*, 3 Pick. 74. See, also, *Sherwood v. Sutton*, 5 Mason, 143; *Mitchell v. Thompson*, 1 McLean, 96. The settled statutes of limitation do not run, in cases of fraud while it is secret. Some difference of opinion has existed, respecting the grounds for this rule; but, in my judgment, the most reasonable and sensible ground is, that, substantially, the title to avoid the transaction does not arise until the fraud is known. This is the practical and just view, and to this I assent; and hold that when the cause of action is a fraud, the action does not accrue while its cause is concealed; and this interpretation I must consider to have been within the intention of the legislature, when it used the same language, which had acquired a settled meaning to that effect.

It is objected, however, that this bill does not contain any averment that the cause of action was fraudulently concealed. But it does state a case of secret fraud, and it would be difficult to distinguish this from fraudulent concealment. A secret, or what is the same thing, concealed fraud, when it is the cause of action, is a fraudulent concealment of the cause of action.

Another cause of demurrer was, that the repeal of the bankrupt law put an end to the complainant's right to sustain this bill; but it is clear the saving clause in the repealing act covers the case.

The demurrer is overruled.

Stewart, for the demurrer.

Allen and Warren, contra.

HENRY WARREN vs. ALBERT EMERSON.

A transfer of a negotiable note and mortgage to the plaintiff, to indemnify him, he agreeing to retransfer them if indemnified, *held*, not a legal mortgage, but a conveyance in trust.

The maker of the note, having acquired the equitable interest of the assignor, may use it in his defence to an action at law on the note.

THIS was an action by the indorsee of a promissory note against the maker. At the time the note was indorsed to the plaintiff, he gave to the indorser, who was also the payee of the note, the following memorandum, in writing:—

Boston, *December 22, 1848.*

Whereas, Nathaniel Hatch, of Porter township, State of Pennsylvania, has this day indorsed and delivered over to me the note of Albert Emerson, of Bangor, dated September 14, 1847, for the sum of twelve hundred dollars, payable in two years from the date thereof, with interest; which note is secured by mortgage of land in Bangor, Maine, named in the mortgage deed of September 10, 1847, and this day assigned to me by said Hatch; all of which is done to hold me harmless against the payment of my two acceptances this day to said Hatch's order, payable at the Bank of Commerce, in Philadelphia, for the sum of five hundred dollars each, at six months from date; and on the payment of said acceptances, on the day on which the same are payable, and the sum of fifty dollars, I agree to deliver said note, and reassign said mortgage to said Hatch.

HENRY WARREN.

Only one of the plaintiff's acceptances was negotiated by Hatch, who failed to take it up at its maturity; and it

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was ultimately paid by the plaintiff. On the second day of November, 1850, Hatch gave to Emerson the following order:—

BANGOR, *November 2, 1850.*

HENRY WARREN, Esq.

DEAR SIR:— Having settled with Albert Emerson the amount due on mortgage from him to me, the same which I assigned to you, you will assign said mortgage to him, or discharge the same, as he may direct, upon his satisfying your claim on the same.

NATHANIEL HATCH.

The question was, whether the plaintiff could recover of the defendant any greater sum than was necessary for his indemnity, and the sum of fifty dollars, mentioned in the memorandum.

CURTIS, J. The memorandum, given by the plaintiff to Hatch, declares the trust upon which the note and mortgage were held by him. The legal effect of the arrangement was, that the plaintiff became the holder of the legal title to the note and mortgage, clothed with an equitable right to apply their proceeds to his own indemnification; and that, subject to this right of the plaintiff, the equitable interest and ownership remained in Hatch. In other terms, the plaintiff held the note and mortgage in trust, to apply so much of their proceeds as might be needful to indemnify himself and pay the sum of fifty dollars, and the residue to pay to Hatch.

It has been argued, that the transaction amounted to a legal mortgage of a chattel, which became absolute in sixty days after the breach of the condition, according to the local law of Maine. But to constitute a technical legal mortgage, there must be a condition in the convey-

ance, or in some defeasance making part of the same transaction, by the mere force of which the title is revested in the mortgagor, if the condition is performed. This memorandum does not contain such a condition; it provides for a retransfer of the title from the plaintiff to Hatch, if the acceptances shall be paid by Hatch at their maturity; and if it did set out such a condition, still it would not amount to a defeasance, so as to constitute a technical mortgage, because an interest in the realty was conveyed by deed, and the instrument of defeasance must be under seal.

It is true, the note is a chattel; but it can hardly be, that the interest in the realty was intended to be held by one species of title, and the note by another. Both were transferred to the plaintiff for the same purpose, and as one transaction; both were agreed to be retransferred by him at the same time, and in the same event; and the note and mortgage together, made one security. To suppose that the parties intended to mortgage the note, and convey the interest in the realty in trust, is quite inadmissible. This renders it unnecessary to examine the cases in 2 Barb. Supr. C. R. 538, 3 Hill, 593, and 2 Comstock, 443, which, being either pledges or mortgages of stocks, are distinguishable from this case.

I am of opinion this was not a legal mortgage, but a taking of security by way of an absolute transfer of the whole legal title, leaving the equitable title to the proceeds in Hatch, subject to the plaintiff's rights, above stated.

This being so, Hatch could certainly transfer his equitable title to Emerson, and by his order on the plaintiff, has done so. In *Mandeville v. Welch*, 5 Wheat. 286, the Supreme Court say:—"In cases where an order is drawn for the whole of a particular fund, it amounts to an equita-

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ble assignment of that fund; and, after notice to the drawee, it binds the fund in his hands."

The question is, whether Emerson can avail himself of this equitable title in his defence. There are certain equitable titles which courts of law, in modern times, take notice of and give effect to. Among them are assignments of *choses in action*, which are protected by courts of law from all adverse proceedings by the holder of the legal title; and I can perceive no reason why this equitable title, gained by Emerson through the assignment from Hatch, should not be protected. It is true that, ordinarily, it is only the assignee of the whole *chose in action* who is protected; and the doctrine is not extended to partial assignments. *Mandeville v. Welch*, 5 Wheat. 277. But here the whole *chose in action*, arising out of the written promise of the plaintiff to Hatch, is assigned to Emerson; and the reason of the limitation of the doctrine can have no application to this case; that reason is, that a debtor cannot, by having a demand split up by partial assignments, be made accountable to different persons without his own consent. But here the debtor does consent; he is himself the assignee. It is true, the person here seeking protection for an equitable title, is the debtor; he desires to avail himself of it in his defence, *valeat quantum*.

But why should he not be allowed to do so, as well as a plaintiff be allowed to make a similar title the ground of a valid claim? There is one reason for allowing this defence, which often determines courts of law to give effect to defences. It prevents circuity of action. If the plaintiff should recover the whole sum of Emerson, he could sustain a suit in equity, or an action for money had and received, in the name of Hatch, to recover from the plaintiff, under his written memorandum, whatever may

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remain after his claims are satisfied. I do not perceive that there is any thing inconsistent with established modes of proceeding at the common law, in doing complete justice between the parties in this action, by giving effect to the equitable title of the defendant. It is a new case, in its facts, but I think not in its principles. *Neponset Bank v. Leland*, 5 Met. R. 259. A judgment will, therefore, be entered for the amount paid by the plaintiff, and interest and cost of protest of the bill; and to this is to be added the sum of fifty dollars, and interest from the 22d June, 1849, the time when that sum was agreed to be paid.

Warren, pro se.

Rowe, for the defendant.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

NEW HAMPSHIRE DISTRICT, OCTOBER TERM, 1852.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. MATTHEW HARVEY, District Judge.

DANIEL R. SORTWELL *et al.* vs. PETER HUGHES.

A statute inflicting a penalty on a sale, extends only to executed sales, by which the property passes from the vendor to the vendee, and not to mere executory contracts, especially if they are declared void, by another statute of the same State.

A mere sale in one State or country, made with knowledge that the vendee intended to use the property, to violate some positive law of another State or country, can be the foundation of an action in the State or country whose law was intended to be violated.

THIS is an action for goods sold and delivered. An auditor, appointed by consent of parties, having made a report, it was agreed that his report should be taken to be a statement of facts. The material facts found by him were, that the defendant was engaged, at Dover, N. H., in

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the sale of spirituous liquors without a license; that one of the plaintiffs, being from time to time at the defendant's place of business in Dover, received verbal orders from him for these liquors, promised to send them to him, and on his return to Boston, did deliver them, either at the Boston and Maine Railroad, or on board some vessel, consigned to the defendant, at Dover, who, upon their reception, paid the freight. One parcel was ordered by the defendant, personally, in Boston, and sent in the same manner as the others.

CURTIS, J. The statute law of New Hampshire, in force when these transactions took place, inflicted a penalty upon any person, not licensed, who should sell any spirituous liquor or wine.

The first question is, whether the sales, for which this action was brought, were made in the State of New Hampshire. If they were not, that statute, which can have no extraterritorial operation, did not subject the plaintiffs to any penalty.

A sale has been defined to be, "a transmutation of property from one man to another, in consideration of some price, or recompense in value." 2 Bl. Com. 446.

Was enough done between these parties, in the State of New Hampshire, to pass this property to the defendant? In the first place, it does not appear that the orders given by the defendant, and assented to by the plaintiff, in New Hampshire, pointed to any particular casks or packages. The kind, the quantity, and the price, are all the particulars found by the auditor to have been agreed on. It remained for the vendors, after the return of one of the plaintiffs to Boston, to fix on the particular liquors to be sent to answer the order, either by separating them from larger quantities, or by designating and setting apart par-

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ticular casks or packages. Indeed, it does not appear that the liquors actually sent were even owned by the plaintiffs when the orders were given.

Besides, under the statute of frauds, the oral contract of sale was not sufficient to pass the property. It is true it passed afterwards, by the delivery to the carrier, that mode of delivery being the one found by the auditor to have been agreed on by the parties. *Hart v. Sattely*, 3 Camp. 528.

But this act was done in Massachusetts.

To test this question, suppose the plaintiffs had been indicted in New Hampshire for violating this penal law, and the jury had found specially the facts reported by the auditor, it seems to me the plaintiffs could not have been convicted, because it would not appear that a complete sale had been made in the State of New Hampshire.

I am aware that there is a decision by a highly respectable court, *Territt v. Bartlett*, 21 Vermont R. 184, that a similar statute in the State of Vermont was violated by acts not distinguishable from those in the case at bar. If this had been so decided in New Hampshire, by the highest court of law, I might have felt bound to yield to the exposition of a statute of that State, by that court. But I cannot construe a penal statute, which punishes a sale, so broadly, as to hold, that it applies to a mere executory contract for a sale. In my judgment, it extends only to executed sales, by which the property passes from the vendor to the vendee; and, in the absence of any decision to the contrary in New Hampshire, I must so hold in this case.

And if the acts done in New Hampshire were not sufficient to subject the plaintiffs to a penalty, there is no implication that those acts are forbidden by statute; and so there is no ground to argue that, for this cause, the action cannot be sustained.

I understand the doctrine of the highest court of law in New Hampshire to be, that if a penalty is affixed to an act, this carries with it an implication that the act itself is forbidden; and if forbidden, it cannot be the ground of an action. But if what was done, in this case, at Dover, is not by implication forbidden, and if what was done at Boston cannot be within any statute of New Hampshire, the cases decided in that State can have no application. 10 N. H. R. 377; 14 Ib. 294, 431.

The other ground of defence is, that if there was not a sale in New Hampshire, the property was sold by the plaintiffs, with a knowledge that the defendant intended to sell it, in violation of the law of New Hampshire; and no recovery can be had, according to the law of that State.

Having come to the conclusion that these sales were not made in New Hampshire, and it not appearing that the plaintiffs in any way participated in the defendant's illegal sales, or did any thing, except to sell the property in the usual course of their business, the case of *Holman v. Johnson*, Cowper, 341, is directly in point, to show that a recovery may be had. I am not aware that this case has been overruled in England; though the extension of the principle, to a sale in England, in the case of *Hodgson v. Temple*, 5 Taunt. 181, has been much questioned. *Cope v. Rowlands*, 2 M. & W. 149; *Langton v. Hughes*, 1 M. & S. 593; *Cannan v. Bryce*, 3 B. & Al. 179. And in the case decided in Vermont, although *Holman v. Johnson* is said to go to the verge of the law, it is assented to, as not in itself wrong. I am inclined to the opinion, therefore, that I should take the same view of this case, if I were to decide it according to my own judgment of what the law is, as was taken in *Holman v. Johnson*; but I am relieved from this necessity by the decision of the Supreme Court

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of the United States, in *Harris v. Runnells*, 12 How. 79. This decision goes even further than *Hodgson v. Temple*, and holds, that where the sale was an offence by reason of a statute, but the act itself was not immoral, and the sale itself was not declared void by the statute, there was no implication, from the mere infliction of the penalty, that the contract was forbidden, and so void. I found myself unable to unite in the opinion in that case, but I am bound by it. *A fortiori*, upon the principles of that decision, there is no implication that the statute forbids a sale in another State, to a person who intends to bring the property into New Hampshire and there sell it, contrary to the law of that State, and no principle of the common law which renders such a sale illegal and void.

But I more than doubt whether the defendant has, in point of fact, brought himself within the principles on which he relies. The auditor has not found, that at the several times when these sales were made, the plaintiffs, or either of them, knew that the defendant had no license, and intended to sell these liquors in violation of the law of New Hampshire. He finds that one of the plaintiffs was in the defendant's store, several times while the account was accruing, and saw persons there drinking, and was aware that the defendant had no license to sell intoxicating liquors, and asked him, at the time he first proposed to sell to him, if he was not afraid of being prosecuted for selling liquors, and he said that he was, and had been prosecuted, and the plaintiff said he must be careful. Certainly these facts would justify the inferences of fact on which the defendant relies; but a statement of facts is like a special verdict, and the Court can draw no inferences of fact. Now, the material facts found are, that several times, while the account was accruing, one of the plaintiffs knew the defendant had no license. How can the

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Court apply this to any particular sales? He asked him, at the time he first proposed to sell to him, if he was not afraid of being prosecuted; but it is not said he did in fact then sell any thing; and how can I infer the fact that this property was sold, for the sole purpose of being re-tailed by the defendant in New Hampshire, he neither having, nor intending or expecting, to obtain a license? It may all be true; the facts found, unexplained, would lead me to believe so; but I have no right to act upon the inferences which I might draw, the parties not having conferred upon me any authority to draw any inference of fact whatever.

Let a judgment be entered for the plaintiffs, for the balance found by the auditor, and interest from the date of the writ.

Hackett, for the plaintiffs.

Christie, for the defendant.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MASSACHUSETTS DISTRICT, OCTOBER TERM, 1882.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. PELEG SPRAGUE, District Judge.

THOMAS RICHARDSON *vs.* THE CITY OF BOSTON.

When both the Judges of the Circuit Court are incompetent, from interest, or having been of counsel, to sit in a cause, it is to be certified to the nearest Circuit Court in this circuit, competent in point of law to try the same.
In cases of admiralty appeals and writs of error from the District Court, if the Judge of the Supreme Court assigned to this circuit, cannot sit, for either of the above reasons, the case must be certified to the nearest Circuit Court in the second circuit.

IN this case Mr. Justice Curtis having been of counsel with the plaintiff, while at the bar, and the District Judge being an inhabitant of the city of Boston, and therefore interested in the result of the case, it became necessary to enter an order to remove the case to another Circuit Court, under the Act of Congress of February 28, 1839, s. 8, (5 Stat. at Large, 322.)

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The defendants moved that it be certified to another Circuit Court, and desired that it may be to the Circuit Court for the Southern District of New York. The plaintiff objected to this, and suggested that it should be certified to the Circuit Court for the District of Rhode Island. It was an action on the case for a public nuisance, alleged to be specially injurious to the plaintiff, as the owner of a wharf, in the City of Boston. The plaintiff was a citizen of Rhode Island. It was stated at the bar, and not denied, that the suit involved a right of much pecuniary value.

CURTIS, J. The Act of Congress requires the judges though interested, to make an order, designating the particular Circuit Court to which the action shall be removed. The duty is one of considerable delicacy, and the statute should, if possible, be so construed as to grant to judges thus circumstanced, no more discretion than is necessary to prevent a failure of justice. In the same spirit, and for similar reasons, I conceive that such judges, in exercising whatever power has been necessarily confided to them, should endeavor to lay hold of some rule, fit to be applied to all cases, and not attempt to decide on the circumstances of the particular case, their relation to which may prevent them from rightly appreciating.

There are two governing elements contained in the statute. The first is, "the most convenient Circuit Court," the second, "in the next adjacent State or circuit."

It is not difficult to perceive why the alternative was given, allowing a removal to a Circuit Court in the next adjacent circuit, instead of confining it to the next adjacent State. In admiralty appeals, or writs of error from the District Court, if the Judge of the Supreme Court be interested, it would not be in accordance with our system,

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and scarcely decorous in itself, to remove the cause to another district in the same circuit, to be heard by another District Judge; and it is possible, that a Circuit Court might not be found in the next adjacent State; for since Kentucky was admitted into the Union there have been, at all times, I think, States in which there has been no Circuit Court, as there is none now in Wisconsin, Iowa, Florida, Texas, or California. In passing a general law to cover this whole subject, it might be proper for Congress to make the power broad enough to include all cases, but it may not be fit to use this broad power except in the particular classes of cases which gave occasion to it.

The leading idea of the law is, I think, proximity of place; and that Circuit Court which is competent to act, and nearest to the subject of the controversy, the witnesses, the parties, and the Court whence the removal is to take place, is the most convenient Circuit Court within the meaning of this act.

I am not willing to enter into the nature of the particular case, or to consider the supposed superior fitness of one of these tribunals, over another. It would be a difficult, and not slightly invidious task, to balance the advantages, real or imaginary, which the parties may conceive are to be gained or lost by resorting to one tribunal rather than another, when the law deems both equally competent. Least of all shall I attempt to do this in a case in which the law disqualifies me to sit as a Judge. In my opinion, it is in conformity with the Statute, and the rule should be, where the parties do not agree, that cases thus removed, should go, as a matter of course, to the nearest Circuit Court, in this circuit, unless that Court is not competent, in point of law, to try them.

With this view, I am of opinion this suit should be

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certified to the Circuit Court within and for the District of Rhode Island.

C. G. Loring and *Chandler*, for the motion.

R. Choate and *S. Bartlett*, *contra*.

OLIVER SMITH *et al.* vs. THE STEAMER EASTERN RAIL-
ROAD.

The Act of Massachusetts, (Stat. 1848, c. 290,) does not give a lien for materials sold, to a person who has contracted with the owner of a vessel to make certain repairs for a stipulated sum, the vendor having notice of such contract.

The object of the Act was to create liens on domestic vessels for repairs, supplies, &c., to the same extent as the general maritime law gives such liens on foreign vessels.

By the maritime law, the vendor of materials, who sells them to a mechanic whom he knows to have contracted to make repairs for a stipulated sum and to whom, exclusively, he gives credit, can have no lien on the vessel.

THIS was an appeal from a decree of the District Court. The cause was heard on an agreed statement of facts, which was as follows:

"The libel in this cause was filed in the District Court of Massachusetts, on the 19th of August, 1851, by the libellants, copartners, and dealers in lumber, to enforce a lien claimed by them upon the steamboat owned by the respondents.

"Judgment was entered against the respondents by consent, and thereupon they entered an appeal to this Court.

"The case is submitted on the following facts: On or about the 18th of February, 1851, said boat being in need of divers repairs, the respondents made a written contract with one Nathaniel P. Roberts, by which he agreed to do

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a portion of the work, and make a portion of the necessary repairs and improvements on said boat.

"By the terms of the contract of which the libellants had knowledge, said Roberts was to furnish all the necessary materials, as well as perform all the labor for the repairs, for a certain sum stated in the contract.

"And he performed and completed his work about the 20th of July, 1851, having furnished all the materials, pursuant to his agreement, and the respondents paid him therefor in full, before notice of any claim made by libellants. The lumber used for said repairs, was furnished and delivered to Roberts by the libellants at divers times, partly at their shop, and partly at planing-mills, on his orders, to the amount of \$1,075.13. And there was an understanding, before they began, that the libellants should furnish the materials for this job. At the times these materials were delivered, they were entered and charged in the libellants' books, and a transcript of such entries in the journal and ledger is annexed, marked A, which, it is agreed, may be used instead of said books and entries, and be entitled to the same weight as the books and entries, if, in the opinion of the Court, such books and entries are admissible and competent evidence for the libellants, which the respondents deny.

"About the time of the completion of said work, Roberts failed in business. Previous to February 18, 1851, Roberts had been a customer of the libellants, and had had a running account with them to the extent of several thousand dollars annually, for several years, on a credit usually of six months; bills therefor being rendered usually, on the 1st of January and July, in each year.

"At the time Roberts purchased the materials in question, nothing was said or done by him or by the libellants, indicating that the materials were not sold on the indi-

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vidual and sole responsibility of Roberts, nor was any thing said or done by either indicating that he purchased or they sold, in any other manner than previously.

"During the time of the purchases in question, Roberts bought other lumber of libellants, to the amount of about \$100, and there was an unsettled account for lumber, on which Roberts owed them \$600 or \$700.

"Prior to 1st August, 1851, and after the work was completed, the libellants demanded payment of said Roberts of the bill of materials in question; and on the 13th day of August, 1851, the libellants caused a writ to be sued out against said Roberts, a copy of which and the papers in that suit may be referred to as a part of this statement.

"Before the filing of said libel, but after the respondents had paid Roberts in full, the libellants made a demand on the respondents for the amount of said bill.

"The deposition of Roberts, and the contract, may be referred to as a part of this statement by either party. The steamboat in question is of the burden of 242 $\frac{3}{4}$ tons, and without masts. She was enrolled and licensed under the laws of the United States, 19th August, 1842. The license expired 19th August, 1843, and no other has been taken out, and she has been employed only as a ferry-boat to carry passengers to and from the railroad in the harbor of Boston, between Boston and East Boston. If upon the foregoing facts the Court shall be of opinion that the libellants had a lien on said boat, which they could legally enforce at the time of the filing of said libel, judgment shall be entered for the libellants for a sum to be agreed upon, and for costs; otherwise judgment shall be entered for respondents for costs.

"MILTON ANDROS, *for Libellants.*

"WILLIAM DEHON, *for Respondents.*"

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CURTIS, J. The lien asserted by the libellants depends for its validity upon the construction of the Act of the Legislature of Massachusetts, passed on the 9th day of May, 1848, entitled, "An Act establishing a lien on ships and vessels in certain cases." The principal question is, whether by this Act it was intended to create a lien, for the security of a debt, incurred for materials sold to one, who had entered into a contract with the owner of the vessel, to make certain repairs for an agreed sum of money, to be paid to him by the owner, of which contract the vendor of the materials had notice at the time of the sale. That it is competent for the legislature to provide for liens on domestic vessels, to secure not only the debts contracted by, or on behalf of the owner, for labor, materials, and supplies, but also debts contracted by those undertaking the repairs of such a vessel, must be admitted. Such laws, in respect to buildings on land, exist in many of the States, and there is an Act of Congress to the like effect in the District of Columbia, which received a construction by the Supreme Court, in the case of *Winder v. Caldwell*, 14 How. 434. The question is, whether this Act was intended to apply to any other debts than those of the owner of the vessel.

The first section is as follows: "Whenever a debt is contracted for labor performed, or materials used in the construction or repair of, or for provisions and stores and other articles furnished for, or on account of, any ship or vessel within this Commonwealth, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon except mariners' wages."

The terms of the section are not decisive respecting this question. "A debt contracted," may mean by or on behalf of the owner of the vessel, or by and on behalf of one who, having undertaken the repairs, purchases the

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materials on his own account, and uses them upon the vessel in the execution of his contract. The intention of the legislature can be arrived at only by considering the nature of the Act, and of the rights involved in it, and its adaptation to carry out the object contended for by the libellants.

If the Act is to be so interpreted as to embrace this case, it is obvious that by its operation double liens were created; one, securing the stipulated price agreed to be paid to Roberts for all the work and materials under his contract with the owner, and others securing to the libellants, and all persons with whom Roberts contracted for materials and labor, the prices he agreed to pay therefor. The act contains no provision for marshalling these liens, or for restricting the amount of those of the second class, to the contract price agreed to be paid to Roberts by the owners, nor for any means of protecting the owners, by notice or otherwise, against being compelled to pay twice for the same materials. Suppose Roberts had filed his libel to enforce his lien for the contract price; according to this act he must have had a decree. No authority is given to call in other parties with whom Roberts contracted, in order to ascertain whether debts are due to them, for materials used in the repairs, and the owners would ordinarily have no means of knowing with whom Roberts contracted for materials. And yet, having forced the owners to pay Roberts, if he failed to meet his own engagements, the Court would be compelled, on the application of those who had sold materials to him, to make a decree in their favor; and thus oblige the owner, who was in no fault, and had neglected no means of self-protection, to pay Roberts's debts, contracted at his discretion, both as to amount and terms of credit, in addition to their own.

This practical operation of the construction contended for, is so unjust, that I cannot suppose the legislature in-

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tended it. It would require very clear language to convince me that the law was designed to give rights which cannot exist, without producing so much embarrassment and wrong, that it would be really beneficial to no class of persons.

These views are strengthened by looking at other acts passed by the Legislature of Massachusetts upon a kindred subject, and which may, therefore, be considered as *in pari materia*.

Besides the provisions of the Revised Statutes, on this subject, there are two acts now in force for securing to mechanics and material-men payment for labor and materials used in erecting or repairing buildings on land — the Acts of the 24th day of May, 1851, and of the 21st day of May, 1852. The first applies only to labor; and it provides, in terms, for contracts with the owner, "or other person who has contracted with such owner for erecting, altering, or repairing such building," &c.; and it requires a notice of the claim to be recorded in the Registry of Deeds, within sixty days after the labor is performed. The other act applies to labor and materials, and limits the amount of the liens of sub-contractors to the amount of the contract with the owner; and declares that there shall be no lien for materials, "unless the person claiming such lien shall, before furnishing such materials, have given notice, in writing, to the owner of the land, and to the person who has contracted with the owner of the land, that he intends to claim such lien, for materials furnished as aforesaid."

It can hardly be supposed that the legislature should thus enable the owners of buildings to protect themselves against embarrassment and injustice, and at the same time leave the owners of vessels no means of doing so; or that they should have used clear and express terms to confer a lien on sub-contractors upon buildings, and intend to confer

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it on sub-contractors upon vessels, by a mere ambiguity. My opinion is, that so far as respects vessels already built and equipped, the object, and the whole scope of this act was, to create the same lien upon domestic vessels, for materials, repairs, and supplies, as existed by the general maritime laws of the United States upon foreign vessels. The second section of the act provides: "that nothing in this act shall alter, or be construed to alter, or in any way affect, the lien as now existing on foreign ships and vessels." To them it was not designed to apply; probably for the reason that the regulation of liens upon vessels engaged in commerce between the several States, or with foreign nations, and not belonging to citizens of the State, is not a proper subject of State legislation. It is a regulation of commerce, within the power conferred on Congress by the Constitution. Now, it is true that, under the maritime law, materials and supplies are presumed to be furnished on the credit of the vessel and owners until the contrary is proved. But the contrary is proved, when it appears that the materials were sold to a mechanic for his own account. It is true that the libellants expected, when they sold these materials, that they would be used on the steamer, and that, in point of fact, nearly all of them were so used. But they knew that Roberts did not purchase them under any agency for the owners; that he purchased them for himself; that they became his property when delivered; that they were at his risk; and he was at liberty to make any use of them, he might please to make. They were, therefore, bought by him on his own account, and the credit must be deemed to have been given exclusively to him, for he was and was known to be, the sole debtor; and in such a case there is no lien by the maritime law.

It has been argued that this act ought to receive a liberal construction, for the security of those whose labor and materials go to the benefit of owners of vessels, and that

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such liens are favored by the maritime law from sound policy. I entertain no doubt that the liens which that law creates, are for the advantage of commerce, and of the seamen, mechanics, and material-men, in whose favor they exist. But I am equally clear that, to give sub-contractors liens upon vessels, with no adequate means to work them out, without embarrassment and injustice to owners, would, in the end, benefit no one. Its practical effect would be, either to compel owners to employ only those who had so much capital, as to afford undoubted security that they would meet their engagements with third persons, or to transfer the business of repairing vessels, to places where the laws created no such dangers. And either of these effects would be injurious to the classes of persons, whom this law was intended to benefit. In my judgment, sound policy requires an observance, in the case of domestic vessels, of those limits prescribed by the general maritime law, which have been deduced by experience from the practical necessities of commerce, and of the interests of those connected with it.

The decree of the District Court must be reversed, and the libel dismissed, with costs.

Milton Andros, for libellants.

William Dehon, for claimants.

EZEKIEL BYAM *et al.* vs. GEORGE FARR *et al.*

Though the use of an equivalent may be an infringement, yet if the specification and claim expressly declare that such equivalent is not embraced within the invention, its use does not infringe.

THIS was a bill in equity founded on letters-patent, and

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praying for an injunction and an account. The complainants moved for a preliminary injunction, to restrain the defendants from making the thing patented. The opinion of the Court was delivered by

CURTIS, J. The complainants have shown that they are assignees of letters-patent, bearing date October 24, 1836, granted to Alonzo D. Phillips, for an improvement in the manufacture of friction matches, and extended for the term of seven years on the petition of the administrator of Phillips. To make the *prima facie* title, on which to rest this motion for a temporary injunction, the bill alleges that a judgment at law has been heretofore recovered in this Court, against other parties, and states other facts, which it is not necessary to advert to, because this *prima facie* right of the complainants has not been seriously controverted. The real question is, whether the defendants have infringed this exclusive right, so as to subject themselves to an injunction.

The complainants allege that their exclusive right has been violated in two particulars.

1. In the use of the composition of matter claimed by the specification.
2. By putting up the matches in the manner described and claimed therein.

As to the first, it is proved and admitted, that the defendants have used a composition of matter, consisting of phosphorus, sulphuret of antimony, and glue, into which, when in a fluid state, matches, having sulphur on their ends, are dipped.

The claim in the patent is in the following words: "What I claim as my invention is, the using of a paste, or composition, to ignite by friction, consisting of phosphorus, and earthy material, and a glutinous substance

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only, without the addition of chlorate of potash, or of any highly combustible material, such as sulphuret of antimony, in addition to the phosphorus."

To make this claim intelligible, it should be stated, that it is declared by the specification, that the old method of making friction matches was to use a composition, consisting of phosphorus, chlorate of potash, sulphuret of antimony, and glue. So that the invention claimed by the patentee, consists in rejecting two of the elements, namely, chlorate of potash and sulphuret of antimony, and substituting in their place chalk, or some earthy matter. To compare the two methods of the patentee and the defendants, to a certain extent, it may be said, that the patentee has improved on the known compound, by omitting two substances previously used, and introducing one not used; while the defendants have merely omitted one substance, previously used. It is insisted, however, that the sulphuret of antimony, used by the defendants, in point of fact, has the same effect in their composition, as the chalk or other earthy substance has in the plaintiffs' composition. That both act mechanically only, and not chemically; the office of each being to surround the particles of phosphorus, and, aided by the glue, to retain them, and protect them from the air, and from the action of caloric, until the phosphorus is ignited by friction, and then to convey the heat to the sulphur, and thus cause the match to burn. In other words, that, in this compound, and for this manufacture, sulphuret of antimony is a mere equivalent for the earthy matter employed by the patentee; and that though it is not, technically, in the nomenclature of chemistry, an earthy matter, yet that the claim is not to be limited to substances strictly, so termed, because while the specification declares chalk, or Spanish white, to be the best material, it also makes known that the ingredients may be varied, "and other

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absorbent earths, or materials, may be used instead of the carbonate of lime." And it is urged, that the substance of this invention does not consist in the use of carbonate of lime in this composition, but in the use of a material suitable to surround and protect the phosphorus, and convey its heat to the sulphur when ignited, and that the defendants use such a material.

There is, certainly, much force in this argument; but it is encountered by difficulties, which I think insuperable.

To substitute, in place of some one element in a composition of matter, a mere known equivalent, is an infringement; because, although the patentee has not expressly mentioned such equivalent in his claim, he is understood to embrace it, and, in contemplation of law, does embrace it, without an express mention of it. But he is not obliged to embrace equivalents in his claim. He may, if he choose, confine himself to the specific ingredients mentioned, and expressly exclude all others; or he may expressly exclude some, or one other. If he does so, it cannot be maintained that what he has expressly disclaimed, is, in point of law, claimed. Now this patentee declares, in terms, that his composition is to be without the addition of sulphuret of antimony. It is said that he meant to exclude it, because he considered it, as he says in the claim, a highly combustible material; that he was under a mistake, as it is not so. This may be true; but the question is not what induced the patentee to exclude it, but whether he has, in fact, excluded it. If he made a mistake, the Patent Law affords means of correcting it; but, until corrected, the claim must be taken as it stands, whatever error may have led to it.

It is also argued that it was the intention of the patentee, to exclude sulphuret of antimony only when used with chlorate of potash. But this is not consistent with

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the plain meaning of the words ; which are, "without the addition of chlorate of potash, or any highly combustible material, such as sulphuret of antimony." And when it is borne in mind what the composition previously known was, and how the patentee has described his invention, I think it cannot be admitted that the patentee really intended to cover the composition used by the defendants. As already stated, the old method was to combine phosphorus, glue, sulphuret of antimony, and chlorate of potash. If the patentee intended to cover an improvement, consisting only in the omission of the chlorate of potash, as is now said, he might reasonably have been expected so to declare. But instead of this, he, in terms, declared that his invention did not extend to the use of this substance. So far as respects his own intent there can be no question it was to make a claim, which excluded the composition used by the defendants. And this is decisive. It must be remembered that one object of the Patent Law, in requiring the inventor to put on the public records a description of his invention, is to inform the public what may safely be done during the existence of the patent, without interfering with his claims ; and, upon the soundest principles, the patentee must be held to be estopped from asserting a claim, which is expressly waived on the record.

It appeared, by the analysis of the composition on the defendants' matches, that some oxide of antimony and some silver was found in it, and the evidence shows that when subjected to heat, in the process of manufacture, the sulphur combined with the antimony, is partially given off, and oxygen is taken up from the atmosphere. These effects are increased in proportion to the degree of heat applied to the antimony. And it is urged that the use of oxide of antimony and silver are not excluded from, but are fairly included within the patent.

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As to the silica, I am satisfied it is merely an impurity in the sulphuret of antimony of commerce, and that the right to use this is the right to use it in the state in which it is ordinarily bought and used. And, in respect to the changes which it necessarily undergoes in any mere process of manufacturing the composition, the right to make such changes is inseparable from the right to use the thing. There is evidence that, for a short time, the defendants heated the antimony separately, and so set free from it more sulphur, and combined with it, more oxygen. Whether this would amount to an infringement, I have not thought it necessary to determine; because, as it was merely a temporary experiment, which has been abandoned, it cannot afford ground for an injunction after the lapse of considerable time, even if it were free from doubt that it was an infringement, which is by no means the case.

In respect to the other claim, for the manner of putting up the matches in paper, I find it consists in sawing the matches in sheets so as to leave them united at one end, and wrapping them in strips of paper in the mode described. The defendants' matches are left attached at one end in the same way, but not wrapped in strips of paper. I am of opinion that this claim must be construed to embrace only the entire and complete mode described; and consequently, as the defendants do not use that mode, but only a part of it, which the patentee does not claim to have separately invented, the defendants do not infringe on what is thus claimed.

The motion for an injunction is denied, with costs.

Hodges, for the complainants.

Durant, for the defendants.

RICHARD S. FAY *et al.* vs. JOHN B. MONTGOMERY.

If a vessel and cargo be seized as prize, and the owners file a libel on the instance side of the Court, for restitution and damages, the Court will ascertain whether there is a real question of prize, or no prize, to be tried; and if so, will direct the captors to institute prize proceedings.

A captor may forfeit his title by misconduct.

It is a clear duty of a captor to send in his prize for adjudication; but he may be excused, if he cannot do it without so weakening his command, as to endanger the public service.

Quære, whether mere delay is a ground of forfeiture of the rights of captors.

THE opinion of the Court, which states the nature of the proceedings and the necessary facts, was delivered by

CURTIS, J. This is a libel in the Admiralty, filed by Richard S. Fay and Charles B. Fessenden, as owners of the ship *Admittance*, against John B. Montgomery, a captain in the navy of the United States.

The original libel states, that on the 24th of June, 1846, the owners of the *Admittance*, which was a registered vessel of the United States, chartered her to certain persons doing business in New Orleans, under the firm of Wyllie & Egand, for a voyage from New Orleans to San Blas, with a proviso, that if, upon the arrival of the vessel off the port of San Blas, that port should be blockaded, or the discharge of the cargo would be otherwise prevented, the vessel should proceed to the Sandwich Islands, and there remain, until the port of San Blas should be opened; but that it was not the intention of either of the parties that the vessel should enter or trade with any port in the possession of the Mexican Government, unless peace had been previously declared; and that the master was in-

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structed to ascertain, when he got into the Pacific Ocean, and near the coast of Mexico, whether the war between the United States and Mexico continued; and if it did, and San Blas was not in the possession of the forces of the United States, to proceed to the Sandwich Islands.

The libel further states, that, at Valparaiso, the master was informed that the whole coast of California was in possession of the forces of the United States, but on arriving off San Blas, he learned that the war continued, and that port was in possession of the Mexicans; but that the port of San José was in the possession of the forces of the United States, and being in want of wood and water, he proceeded thither. It then goes on to detail some facts tending to show the master did not design to trade with the enemy, and states, that while lying at San José, the sloop of war Portsmouth, commanded by the respondent, arrived, and, without any probable cause, the respondent took forcible possession of the Admittance, and has ever since retained the same; that he did not send the Admittance to the United States for trial, as he might easily and safely have done, and thereby converted the vessel and cargo to his own use; and they pray for a decree, adjudging the defendant to pay the value of the vessel and freight, and other damages. An amended libel was filed, substantially like the original libel, save that it avers that no proceedings have been instituted against the said vessel in any court of admiralty, and it prays that the respondent may be ordered to proceed to condemnation of the vessel as prize, in some proper court, within a fixed time; and that, in default thereof, restitution may be decreed in this suit.

The answer of the respondent, after stating that the Admittance and her cargo were captured as prize of war,

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and propounding certain causes therefor, which are not necessary to be stated in this connection, avers that it was impossible for the respondent, consistently with the public interest committed to his direction, to have sent the Admittance from San José to any port in the United States; but that the ship was carried into the port of Monterey, where a libel was filed against the vessel and cargo in the United States Court of Admiralty for California, by which Court they were condemned as prize.

Proofs having been taken, the cause has been heard upon the question, whether the respondent has so conducted, in reference to this vessel, as to forfeit his rights as captor, and render himself liable to a decree for restitution in this suit. No question is made concerning the other alternative prayed for in the amended libel, because, since it was filed, the captors have instituted prize proceedings in the District Court for the District of Columbia, in obedience to a decree of the Supreme Court of the United States, made in a suit instituted by the owners of the cargo, and carried to the Supreme Court by appeal.

The grounds upon which restitution is claimed, in this case, are thus stated in the libel: "That such seizure and detention were without any legal, justifiable, reasonable, or probable cause, and without the pretence of any; and that the said Montgomery, in committing the same, was guilty of an act of illegal violence; and even if there had been probable cause for the seizure of the said vessel, the said Montgomery was legally bound to send the same to the United States for trial, which might easily and safely have been done, but which the said Montgomery illegally and unjustifiably omitted to do, and thereby illegally converted the same to his own use."

Here are two distinct grounds; the first being that the

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seizure was an act of illegal violence, and the second, that by not sending the vessel to the United States for trial, the respondent illegally converted it to his own use.

In respect to the first, it is certainly true, that it is not enough for the respondent to set up as a defence, that the vessel was captured as prize of war, to bar a libel filed on the instance side of the court for a marine tort in seizing the vessel. He must also make it appear that there is really a question of prize or no prize to be tried. *Glass v. The Betsy*, 3 Dal. 6; *Talbot v. Jansen*, 3 Dal. 133; *Del. Col. v. Arnold*, 3 Dal. 333; *Maley v. Shattuck*, 3 Cranch, 458; *Jennings v. Carson*, 4 Cranch, 2; *The Anna-Maria*, 2 Wheat. 327.

But when it appears there is such a question to be tried, the correct practice, as settled by the case of *Jecker v. Montgomery*, 13 Howard, 498, is, to order the captors to proceed to condemnation. This course preserves the rights of all parties, because, upon such proceeding, by the captor, the prize court may not only award restitution, but decree such damages as may be justly due to the claimant.

In this case, the facts being conceded that the Portsmouth was a public armed vessel of the navy of the United States; that the respondent was the commander of that vessel; that the Admittance, a registered vessel of the United States, was found by the respondent in a port of Mexico, then at war with the United States, and was there seized by him as prize of war, under such circumstances as repel the idea of a mere naked tort, it does appear that there is a question of prize to be tried, by proper proceedings on that side of the court, unless the respondent has forfeited his rights as captor; and this brings me to consider the other ground stated in the libel, that by his omission to send the vessel to the United

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States for trial, the respondent illegally converted the vessel to his own use.

That captors may so conduct towards prize property, as to forfeit their rights as captors, and render themselves liable to make restitution, either with or without damages, is clear. The general proposition, that such restitution and damages may be decreed upon the instance side of the court, on a libel like the present, or, as the practice is in England, upon a monition to the captors to show cause, is equally clear. A case may be made, upon which it would be the duty of the Court to declare, that it will not adjudicate upon the validity of the capture.

But before the Court can so declare, a case of forfeiture of rights, free from all reasonable doubt, must be made out. It is a circumstance of some significance to my mind, that while the general principle, "that a *bond fide* possessor may, by subsequent misconduct, forfeit the protection of his fair title, and render himself liable to be considered a trespasser," has been often laid down, there is no case in the books, within my knowledge, in which restitution has been decreed on this ground, on the instance side of the court, against the will of the captor. There are cases of restitution decreed on monition; but no case, which I have seen, proceeded upon a forfeiture of rights once acquired, and asserted and relied on, by the captors. In the *The Corier Maritimo*, 1 Rob. 287, the captors, upon monition, consented to restitution.

In *The Acteon*, 2 Dods. 48, the captors did not contend against restitution; and the only question made was as to damages and costs. And in these, as well as many other cases, the decree of restitution rested, not upon a forfeiture of rights, but upon defects in the original title.

In considering this part of the case, the question is,

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whether the allegation in the libel, that the respondent omitted to send the vessel to the United States for trial, when he could safely and properly have done so, and thereby illegally converted the property to his own use, is made out in proof.

The answer of the respondent to this part of the libel states, "that it was impossible for him, consistently with the public interests committed to his direction, to have sent the said ship *Admittance* to any port in the United States."

It is objected that this is not such an allegation as entitles the respondent to exhibit proofs; that it is too vague to be sufficient for that, or any purpose. That the allegation is extremely loose and general, and, upon an exception, would have been stricken out, or ordered to be made more specific, must be admitted. But no exception was made to it; both parties proceeded to take their proofs, and it is admitted at the bar, that the libellants have not been surprised or misled. Besides, the propriety of allowing the respondent to exhibit proofs upon the question of his ability to send the vessel to the United States for trial, can hardly be doubted, when it is borne in mind that the libel rests upon an allegation that he could easily and safely have done so, and claims restitution upon the ground of a forfeiture of legal rights, by illegal neglect to do so.

Before considering the facts, upon which the forfeiture is asserted, one principle should be stated, which is entitled to an important effect on this part of the case. It is, that an honest exercise of the discretion necessarily arising out of his command, cannot be treated as such misconduct, in the commander of a public ship of war, as will forfeit the protection of his fair title, and render him liable to be treated as a trespasser.

This principle is too obviously just, to require the sup-

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port of authority; but it will be found to have been laid down and applied in the case of *Dinsman v. Wilkes*, 7 How. 89, and *Dinsman v. Wilkes*, 12 How. 390.

Now, it must be admitted, that the question, whether the necessities of the public service will allow the commander of a ship of war, in time of war, upon a remote station, on the other side of the globe, to spare one of his officers to go home in command of a prize, is one depending on his discretion necessarily arising out of his command. In the first instance, he alone has the power to decide this question; he alone has the needful knowledge of facts, and he is bound to exercise his judgment upon them. Certainly his judgment is not conclusive. Good faith and reasonable discretion are requisite; but it would be not only a hardship, but an injustice, to impose on the commander the duty of determining such a question, and when he has determined it, according to his best judgment, to attribute to him, as an act of misconduct, that he did not come to a different conclusion.

On the contrary, I think, that while no clear and known duty is violated by him, all fair presumptions should be made in his favor. It is true, that it is a clear duty of a commander to send in his prize for adjudication; but this is not an absolute obligation. It depends upon his ability to perform it, and of this, as already said, he must judge in the first instance; and if he decides with reasonable discretion, and with an honest purpose to do his duty to all concerned, I cannot consider him guilty of misconduct, which works a forfeiture. Keeping these principles in view, I am not satisfied that in omitting to send the vessel to the United States, Captain Montgomery violated any known duty, or acted with so little discretion, as to render himself liable as a trespasser. This question has been before the Supreme Court of the United States, in

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the case of *Jecker v. Montgomery*; and unless this case can be distinguished from that upon its facts, I must, of course, come to the same conclusion there arrived at.

In that case, the allegation in the answer of the respondent, that he could not send the vessel to the United States for trial, with a due regard to the public interest, was admitted by the demurrer. In this case it is traversed, and the parties have gone into proofs. This is the principal difference between the two cases.

These proofs satisfy my mind that the necessary stores and supplies for a voyage to the United States were either on board the *Admittance*, or could have been obtained at Monterey. I am also convinced, that the crew were willing to continue on board and work the vessel home, under the command of Lieutenant Revere; so that no men for a prize crew need have been taken from the Portsmouth. For although, in general, the captor must man, as well as officer, a prize, even when it is a neutral, or belongs to citizens, yet this obligation results from the want of a right to subject the prize crew to the command of his own officer; and when the prize crew are willing to engage to serve under the command of the prize-master, and are neutrals, or citizens, no prize crew need be put on board. *The Eleanor*, 2 Wheat. 361.

Lientenant Revere says the crew of the *Admittance* all volunteered to serve under his command, and bring the vessel home; and although it does not appear that Captain Montgomery was informed of this, yet I am strongly inclined to think, that if this had been the only obstacle, it would have been his duty to have made inquiry, which would have apprised him of the fact. But this was not the only obstacle. One of the lieutenants of the Portsmouth was serving on shore; two only remained; and it does not appear that a single passed midshipman was on

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board. Lieutenant Revere has given an opinion, no doubt an honest one, that he might have been spared; but it is an opinion formed under no responsibility of command; and I am not prepared to say, that a sloop of war, on that coast, at that time, officered by only two lieutenants, ought to have been left with only one, in order to send home a prize; and still less, that the commander erred so grossly in not detaching this officer, on such service, as to forfeit his legal rights thereby.

In respect to the proceedings at Monterey, it has been declared by the Supreme Court, in the case already referred to, that they afforded reasonable ground for the belief, which the respondent, in his answers, swears he entertained, that no further proceedings were necessary. Indeed, it may well be doubted, after what was said by Sir William Scott, in *The Maria*, 1 Rob. 376, whether mere delay is of itself a cause of forfeiture; because the claimant has it in his power, at all times, to compel the captor to proceed, and the use of this power is so far a duty on his part, that his omission for six years to resort to it, was held to be a bar to a monition in *The Susanna*, 6 Rob. 48. And the difficulty of awarding restitution against this officer, by reason of delay, would be much increased by the fact, that the government has taken the proceeds of the property, and he has never had them in his own hands. In a regular prize proceeding, where the claimant made out a title to restitution, upon the ground that the capture was illegal, Lord Stowell manifested the utmost reluctance to award restitution against the captor, after the government had received the proceeds of the prize. *San Juan Nepomuceno*, 1 Hag. 269.

I do not think that the executive government of the United States can turn a bad title into a good one, by a recognition of the possession of one of its officers; but if the possession was under a lawful title, and the question

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be, whether the officer has been guilty of such delay as works a forfeiture, it is a circumstance of no trifling weight, that the executive government has received from him the property, and itself retained it.

After a careful examination of this case, I have come to the conclusion, that I ought not to make a decree for restitution in this suit; and I rest in this conclusion with the more satisfaction, because, in the prize proceeding now pending, all the substantial rights of the libellants will be ascertained and determined.

I observe that the decree of the District Court purports, on its face, to be made by consent. I have great doubt concerning the jurisdiction of this court in such a case. The only power conferred on this court by Congress, in suits in admiralty, is as an appellate court. But if decrees are made by consent in the District Court, without a hearing, it becomes, in effect, a court of original jurisdiction. The act of Congress directs this court to pass such sentence or decree as the District Court ought to have passed; but if the parties consented to a decree, there can be no room to question its correctness. The rule of the Court requires reasons for the appeal to be stated. In this case, the reason assigned is, that the District Court ought to have decreed for the libellant; but the record shows that the decree was in accordance with the consent of the libellant, which removes all error.

Subsequently, it was stated to the Court, that the record of the District Court was not correct in stating the decree to have been by consent; that it had been amended, and the amendment certified to this Court, and that it was agreed that the record here should be changed, so as to conform to the truth; and this having been done, a decree was entered, ordering the captors to prosecute, as against the vessel, the prize proceedings already instituted in the Circuit Court for the District of Columbia.

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THE UNITED STATES vs. CERTAIN HOGSHEADS OF MOLASSES.

An appeal from the District Court is properly entered at the term of the Circuit Court, begun next after the entry of the decree in the District Court, although the term of the District Court, during which the decree was entered, had not been ended when the term of the Circuit Court was begun.

If an entry does not contain a part of the goods consigned by the same invoice and bill of lading, it is *prima facie* evidence that the duties have not been paid.

THIS was a motion to dismiss an appeal from a decree of the District Court on an information in the Admiralty for the reason that the term of the District Court at which the decree was entered had not ended when the term of the Circuit Court, at which the appeal was entered, was begun.

CURTIS, J. The question depends upon the construction of the twenty-first section of the Judiciary Act; for although the act of March 3, 1803, also gave an appeal from the District to the Circuit Court, yet it has been held by the Supreme Court, *United States v. Nourse*, 6 Peters, 496, that the act made no change in respect to such appeals, except to reduce the necessary sum from three hundred dollars to forty dollars.

In the *Privateer Montgomery v. The Betsey*, 1 Gal. 416, Mr. Justice Story says the appeal should be to the Circuit Court held next after pronouncing the decree. The precise point was not before him for adjudication, but on examining the language of this section of the Judiciary Act, and especially the proviso, it is quite clear his interpretation was correct.

Motion overruled.

Lunt, District Attorney, for the United States.

Bell, for claimant.

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The appeal having been heard on its merits, the following opinion was pronounced by

CURTIS, J. The District Attorney having filed an *ex officio* information in the Admiralty against this property, founded on the sixty-eighth section of the Collection Act of March 2, 1799, (1 Stat. at Large, 677,) the District Court decreed a forfeiture, and the claimant appealed. That section provides, that any merchandise, subject to duty, and on which the duty shall not be paid, or secured to be paid, which shall be concealed in any vessel or other place, shall be forfeited.

The first question is, whether this merchandise was concealed, within the meaning of the act. I am of opinion it was. It did not appear on the manifest, or invoice of the cargo. It was not entered at the custom-house, or in any manner made known to the collector, or any officer of the customs, by the consignee or master; nor did the consignee at any time manifest any intention to enter it, or to correct any mistake in his entry of the residue of the cargo. He gave to the stevedore, whom he employed to discharge the cargo, directions to discharge only one hundred and eighty-three casks, the amount entered for duties, and no more, and to go down to the skin, leaving the residue in the ends of the vessel, and when this amount had been discharged the hatches were put on as if the cargo had been all out.

I am satisfied the consignee knew the invoice did not contain all the molasses, before the discharge of the cargo was commenced, and there is much reason to believe that part was omitted by his own express direction to the consignor; yet, instead of making, or taking any step to make a port entry, he gives directions to leave the residue of the cargo in the ends of the vessel, has the hatches

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replaced, and the vessel is about to be warped to the flats, for the purpose of scraping her bottom, as if her discharge had been completed, when she is stopped by an officer of the customs.

Several points have been taken in behalf of the claimant. First, it is said a seizure is necessary, and none is proved. It is not necessary to decide whether an actual seizure by an officer of the customs is one of the prerequisites of a forfeiture under this section, because, in this case, such a seizure is admitted by the answer which avers it was made without probable cause.

It is further argued that it does not appear that the goods were dutiable, or if so, that the duties had not been paid, or secured to be paid. That molasses imported from Porto Rico was dutiable, is known to the Court as matter of law. The claimant entered for duties 183 casks, as imported from that island in this vessel. These 183 casks must have been put on board after the residue, from their place of stowage. It is therefore a fair, not to say necessary presumption, that the whole was on board of the vessel when it sailed from Ponce, and was brought from thence; and if so, the presumption is, it was there shipped, and was the produce of that island, and the burden is on the claimant to prove the contrary. Of this there is neither proof nor the slightest probability.

The information properly contains the negative allegation, that the duties had not been paid, or secured to be paid, on these goods, and it must be supported by the requisite *prima facie* evidence. The entry made by the claimant is produced, and it covers only the 183 hogsheads. This is sufficient *prima facie* evidence that he had not paid or secured the duties on the residue, for he could do neither without entering them.

It is further urged that it does not appear that the goods

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seized were not part of the 183 casks entered, and on which duties were paid. But it does appear, that those seized were what were left in the vessel after 183 casks had been discharged; and the claimant having entered for duty that number of casks, and regularly discharged that number under the inspection of the officers of the customs, as being the merchandise entered by him, it is too late for him now to suggest that what he so landed was not entered, and what he concealed on board was entered.

Let the decree of the District Court be affirmed, with costs.

Bell, for the appellant.

Lunt, District Attorney, *contra*.

GEORGE FOSTER *vs.* ABNER S. MOORE.

An exclusive possession of about eight years, under a patent for a useful machine, affecting the business of a large class of persons, is sufficient *prima facie* evidence to entitle the patentee to an injunction previous to a trial at law.

The mere substitution of one known device, for another, though complex, is an infringement.

What is technically a combination, and how it may be infringed, though improved.

THIS was a suit in equity founded on letters-patent granted to Richard Richards, on the 16th day of December, 1844, for "improvements in machinery for cutting leather into soles." The letters-patent had been assigned to the complainant. The specification was in the following words:—

"To all Persons to whom these Presents shall come :

"Be it known that I, Richard Richards, of Lynn, in the County of Essex, and State of Massachusetts, have in-

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vented certain *improvements in machinery for cutting leather into soles*, and that the following description and accompanying drawings, taken in connection, constitute a full and exact specification of the construction and operation of my said invention :—

“Figure 1, of the drawings above mentioned, represents a top view of my machine. Figure 2, is a side elevation. Figure 3, is a longitudinal vertical and central section. Figure 4, is an elevation of the end nearest to the cutting knives. Such other drawings as may be necessary to the following description will be referred to and described therein. So far as my machine consists of one or more cutters, suitably arranged in frame-work, and capable of being raised from, and depressed upon a platform beneath them, for the purpose of supporting the leather during the operation of cutting, it does not differ from many other machines in common use.

“A, Figures 1, 2, 3, is the frame work or table, which sustains the operative parts, and within which a frame B, is arranged in the position as seen in the drawings, and sustained in suitable bearings, in which it may be freely moved up and down in a vertical direction,—the object of the frame being to carry and elevate and depress the cutters. The frame B, is operated by the foot of the attendant, applied upon a treadle C; the said treadle being connected to the frame B, by a suitable roll D, jointed at its lower extremity to the treadle, and at its upper to the frame—the same being seen in Figure 3. A curved arm E, projects upwards from the treadle, and has at its upper end a projection a, to which one end of a strap b, is attached; the said strap being wound around and attached at its other end to a pulley or drum c, fixed upon a main transverse shaft d, upon which is a fly-wheel e. Another strap f, is attached at one end to, and wound around the

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drum *c*, in a reverse direction to that of the strap *b*, and extends downwards, and is secured at its other end to the treadle, so that the movement of the treadle by the foot causes a motion, first in one direction, and next in the opposite, of the balance or fly-wheel *e*. A small pulley *g*, is fixed upon one end of the shaft *d*; a strap or band *h*, being attached to the periphery of the pulley, and passing partly around it, thence upwards, in contact with a guide pulley *i*, thence over a pulley *k*, and thence downwards, and having a weight *l*, appended to it, as seen in the side elevation. The pulley *k*, runs loose upon the end of the knife or cutter shaft *m*, and has a small dog or pawl *n*, jointed to its side, and pressed against the toothed circumference of a ratchet wheel *o*, by a spring *p*,—the ratchet wheel being fixed upon the end of the cutter shaft.

The cutter shaft *m*, turns or revolves in suitable bearings, in the frame *B*. It has the holders or plates *qq*, of the two cutters or bent knives *r*, *s*, confined upon it between its bearings, as seen in the drawings. Each of said holders is formed rectangular in its cross section, and rests upon the shaft, which is formed to receive it; the one holder with its knife being directly over the other, and its knife,—that is to say, the holders being on opposite sides of the shaft, and so arranged that the two knives, which are to be curved alike, shall be brought into line transversely with each other, throughout the curves of both. The two holders of the knives turn midway between their ends upon a pin *t*, which extends through, and is fixed in the cutter shaft, and projects from the same into each holder, so that when the end of one, or adjacent ends of both of the holders, is moved transversely in one direction, the other end of the same, or other adjacent ends of both, will be equally moved in an opposite direction, thus enabling us at any

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time to narrow or widen the toe or heel of the sole as occasion may require.

"The adjacent ends of the cutter holders are confined down upon the shaft by a screw *u* or *v*, which passes through one of the holders and the shaft, and is screwed into the other holder,—there being an elongated slot or opening formed transversely through the shaft for each screw to pass and move through, when the adjacent ends of the cutter holders are moved to the right or left transversely. Figure 5, denotes a vertical cross section of the cutter shaft and cutter holders taken through one of the confining screws, and its slot, *u*, being the screw, and *w* the slot. On the end of the cutter shaft, opposite to that on which the loose pulley is placed, a circular plate *x* is fixed,—the said plate having two notches formed in its circumference on opposite sides of its centre, and at one hundred and eighty degrees distant from the centre of one to that of the other; the said notches being arranged in a vertical line with each other. An end view of this plate is given in Figure 6, in which one of the notches is seen at *y*, the other being covered by the lower end of a slide *z*, which is adapted to the surface of the plate so as to play up and down vertically,—the length of the said slide being equal to the diameter of the plate, diminished by the depth of one of the notches. A latch *a*¹ is arranged horizontally over the cutters and turns on a fulcrum or joint at *b*¹, in such manner as to allow its end over and which is in contact with the circular plate *x*, to play up and down vertically. A stud, or other analogous contrivance, *c*¹ projects vertically from the frame *A*, directly underneath the slide *Z*, and has its top graduated or situated at such a distance from the lower end of the slide, that when the frame *B* descends, so as to carry either one of the cutters through the leather to be cut, the said stud

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will come into contact with the slide, and elevate the same to such extent as to throw the latch a^1 out of the notch, and thereby permit the cutter shaft to be partially revolved so as to bring the knife which was previously upwards into the position of the one which last performed its cutting operation, and thereby turn the circular plate so as to cause the latch to fall into the other notch. The partial revolution of the cutter shaft is effected by the treadle when it rises, acting through the arm E , and the mechanism directly intervening between it and the cutter shaft. When the treadle is depressed, the loose pulley upon the cutter shaft carries the dog or pawl over the teeth of the ratchet wheel O ; that is to say, causes it to slip or slide over the same, but the instant the direction of the pulley is reversed by the band h , which is wound upon the pulley g , the dog acts in the teeth of the ratchet wheel and turns the cutter shaft. The leather to be cut into soles, being previously reduced to a proper width, is placed upon the table or platform G , and between parallel guides $H H$. It is pressed forward beneath the cutting knife until it comes into contact with a vertical gauge plate K , which extends downwards from a horizontal shaft L , supported and moving in bearings $M M$, in a frame N , which is capable of being moved towards or from the cutter by a screw O , or any other suitable contrivance. The shaft L , has a bent lever P , fixed upon one end, as seen in Figures 1, 2, the said lever extending in one direction towards and underneath the cutter shaft, and being borne up against the said shaft by a weight Q , applied upon its opposite end. From the above it will be seen that the depression of the frame B , will cause the end of the lever P , first mentioned, to descend, and thereby turn the shaft L , a little in its bearings, in such manner as to cause the lower end of the gauge plate to move in a direction away from the cutter, and

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allow the piece of leather separated from the sheet thereof to fall freely away from the same and drop upon an inclined plane R, over which it slides out of the machine. Having thus described my machinery, that which I claim is as follows, namely: I claim the above specified manner of operating the cutting knives *r, s*, applied upon the revolving shaft *m*, namely: the arranging said knives as described upon a revolving shaft and causing them and the shaft to be partially revolved at suitable periods of time in the manner as set forth, so as alternately to bring each cutting knife in succession into the required position for it to cut through the leather when depressed by the frame or mechanism by which it is made to act upon the same. I also claim, *in combination with the above*, giving to the gauge plate (*K*) at the time of, or soon after the depression of either knife into the leather, a motion in a direction away from the cutting knives in order to permit the piece of leather separated from the sheet thereof to fall freely away from the same, *as described*.

"I also claim the combination of mechanical parts by which the requisite degrees of rotary motion of the shaft which carries the cutting knives, are determined in the manner hereinbefore described, the said parts being the notched circular plate *x*, applied upon the rotary cutter shaft, the catch or latch *a*,¹ the slide *Z* upon the circular plate, and the fixed stud, or other analogous contrivance, by which the slide is moved when the knife frame is depressed; the whole being applied and operating substantially as described.

"I also claim, attaching the knife holders to the revolving shaft *m*, in such manner as to admit of a corresponding movement of their adjacent ends, in transverse direction, at one and the same time, and the fixing the said ends afterwards to the shaft, the same being for the purpose of

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narrowing or widening the toe or heel of the sole as set forth.

"In testimony that the above is a correct specification, I have hereto set my signature this twenty-first day of September, A. D. 1844.

RICHARD RICHARDS.

"Witnesses, R. H. EDDY,
JOHN NOBLE."

The complainant alleged that each of the things specifically claimed were used by the defendant. A machine constructed according to the specification, and also the machine complained of, were produced, and affidavits of experts were made by each party. The motion was for a preliminary injunction, founded on long possession under the patent, and an allegation that the defendant's machine was an infringement.

CURTIS, J. The first question is, whether the complainant has shown such a *prima facie* title to the things patented, as will enable him to call on the Court to protect his right until it can be tried.

The affidavit of Pillsbury states that the patentee, and those claiming under him, have been engaged in building these machines since the letters-patent were granted, a period of about eight years. That, during this time, they have made and sold upwards of one hundred and fifty of these machines, and they have been put in use in Massachusetts, Maine, Ohio, Pennsylvania, and other parts of the country. That about fifty of these machines are now in daily use at Lynn, in Massachusetts, the place where they were originally introduced. And that, except in this case, the witness has not known the novelty, or validity of Richards's patent disputed; nor has he known any attempt

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made to infringe it. No conflicting evidence has been introduced by the defendant, tending to show that the possession of the patentee has been questioned, or interrupted, or that it has not been as extensively enjoyed as this witness declares; nor is the validity of the patent denied by any affidavit of the defendant.

This is such a *prima facie* title as a Court of Equity is bound to protect. The familiar rule stated by Lord Eldon, in *Hill v. Thompson*, 3 Meriv. 622, is, that when a patent has been granted, and there has been an exclusive possession of some duration under it, the Court will enjoin, without putting the party previously to establish his right at law. And this rule has been followed in this and other Circuits, and is well established in England. *Isaacs v. Cooper*, 4 Wash. 259; *Washburn v. Gould*, 3 Story's R. 156, 169; *Orr v. Littlefield*, 1 W. & M. 13; *Bickford v. Skewes*, Web. P. C. 211; *Neilson v. Thompson*, Web. P. C. 277. It is not possible to fix any precise term of years during which the exclusive possession must have continued. The reason for the presumption in favor of the validity of the grant is, the acquiescence of the public in the exclusive right of the patentee, which, it may reasonably be assumed, would not exist unless the right was well founded. And it is obvious, that this public acquiescence is entitled to more or less weight, according to the degree of utility of the machine, and the number of persons whose trade, or business are affected by it. I am satisfied that this is a useful machine, not only because it is so stated by Pillsbury, but from the number which are now in use; and there can be no doubt that it affects the trade and business of a numerous and intelligent body of persons in this and other States. In a case where, though the validity of the patent has been questioned, no specific and satisfactory ground of doubt has been laid by the defend-

ant, this acquiescence, for a period of about eight years, dispenses with the necessity of bringing an action, at law, before moving for a preliminary injunction. But the complainant must show an infringement by the defendant; and the next question is, if he has done so.

In this, as in other patent cases, this is a complex question, partly of law and partly of fact; and in this, as in most patent cases, when the law has been determined and applied, the facts do not present great difficulties.

The first inquiry is, what is claimed? and the second, has the defendant used what is claimed? The construction of the claim is matter of law. It has been argued that the first claim is for an abstraction. I do not so consider it. The claim is, of the described means of arranging the knives on a shaft, and causing them to revolve and be depressed, so as to produce certain effects; and this is, in substance, a claim of certain mechanism, described in the specification, so combined and arranged, as is therein shown, and adapted to produce specific effects. In point of form, I see no sound objection to the claim.

Laying aside, for the present, the last claim, which is for the attachments of the knives, I find the mechanism claimed, consists in a revolving shaft having two knives placed upon it in a particular manner, and in the means of working this shaft, and, in combination with these, the means of giving to the gauge plate certain movements. It has not been denied, that the gauge plate itself, in the defendant's machine, and the means of moving it, so as to allow the soles, when cut, to fall out of the machine, are substantially the same as in the plaintiff's; and, indeed, an inspection of the two machines can leave no reasonable doubt on this point. It is true, the defendant's has a screw, by means of which the gauge plate may be moved, so as to adapt it to different sizes of soles; but this is plainly an

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addition to, and not an alteration of, this part of the thing patented, which does not consist in the gauge plate itself, or the means of graduating it, but solely in the means of communicating to it the rocking motion which allows the escape of a sole when cut, and then brings the plate into position to act as a gauge.

But it is correctly argued that even if the patentee was the original inventor of this means of giving this motion to the plate, and the defendant has used it, still, as it is claimed only in combination with the shaft and knives, and mechanism to move them, unless the defendant uses these also, he does not infringe; because these are, undoubtedly, an essential part of the combination, and if the whole, in substance, is not used, there is no infringement. And, therefore, it is necessary to see whether the defendant has infringed upon what is first claimed.

That he uses a shaft, with knives attached to it in the same manner as is described in the plaintiff's specification, is clear. Here, also, he has added a screw, by means of which the knives may be moved, when the screws which attach the knives to the shaft, by compressing the knife-holders, are loosened. But this does not affect the arrangement of the knives on the shaft. It is an addition to, and not an alteration of, the thing patented. But the real question is whether the defendant's means of working the shaft are, within the Patent Law, substantially the same as the plaintiff's.

These means may be considered under two heads: namely, the mechanism by which the shaft is rotated and depressed, and that by which the degrees of rotary motion, requisite to bring the knives into the position to cut, are determined, and the revolution arrested and the shaft held while the cut is made, and then released. As to the first, Mr. Robert H. Eddy, whose affidavit is adopted by Mr.

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Thomas Blanchard, as correctly expressing his views, says : " I do not perceive any thing essentially new, or not well and long known to mechanics, in the machinery used to rotate the shaft in the defendant's machine ; nor does it seem to me to be so practically useful as that used by Richards for such purpose. The invention of Richards, namely, the arranging the knives upon a revolving shaft, and causing them and the shaft to be partially revolved, at suitable periods of time, in the manner as set forth in Richards's specification, namely, on its axis, so as to bring the knife, which was previously upwards, into the position of the one which last performed its cutting operation, is, in my judgment, identical with that adopted in the machine seen at the shop of said Moore," (that is, the defendant's machine.) " The vertical and intermittent movements of the knife-shaft are produced by machinery, which may be considered as common and well-known mechanical equivalents for those described in the said specification of the said Richards." No affidavit made by the defendant contradicts this ; for though, as will presently be noticed, his experts declare that the two machines, in their opinion, are not substantially the same ; they do not say that the defendant's devices are not well-known means of accomplishing the same ends effected by Richards. Indeed, in the written argument for the defendant, it is not insisted, that there is a substantial difference between the machines in this particular. The position there taken is, " that the combination of mechanical parts, whereby the degree of rotary motion is determined in the defendant's, is not shown to be substantially the same as in the plaintiff's."

It appears, by an inspection and comparison of the two machines, that in both, the degree of rotary motion is determined by a notched plate, fixed to the end of the

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knife-shaft, with which a catch engages when the notches are brought opposite to the catch in their revolution. The knife-shaft is thus arrested and fixed while it descends, and the knife cuts. The catch is disengaged, when this operation is completed, and the knife-shaft is left free to revolve, so far as to bring the other notch opposite to the catch, which engages with it, and the same operation is repeated. In the plaintiff's machine, the catch is placed above the plate, and at a right angle with it, and engages the notch, partly by its own weight, but assisted by a spring. In the defendant's, the catch is placed opposite the face of the plate, which has a flange upon it, in which are the notches; and the catch is a spring-catch, of well-known construction. In the plaintiff's machine, the catch is disengaged from the notch by a slide, working on the face of the plate, put in motion upwards against the catch by descending with the knife-shaft, and striking a stud fixed to the frame of the machine.

In the defendant's, the catch is disengaged by impinging on an inclined plane, or wedge, against which it is moved by descending with the knife-shaft. In other words, the diversities are, that the defendant uses a spring-catch, the plaintiff a catch and spring; the defendant disengages by working against a wedge, the plaintiff by working through a slide against a stud. Of these diversities, Mr. Eddy, supported by Mr. Blanchard, says: "These are not, strictly, a combination, like that described in the patent of the said Richards; but they are a common and well-known combination for the purpose, and are mere substitutions for such mechanism as is described by the said Richards." Six experts, including Mr. Thompson, who built the defendant's machine, testify that, in their opinion, the two machines are not the same in principle and mode of operation. But no witness says that the use of a spring-catch,

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in place of a catch and spring, or the use of a wedge, or inclined plane, to disengage a catch, in place of a slide and stud, were not, what Mr. Eddy and Mr. Blanchard pronounced them to be, well-known combinations for those purposes. In my judgment, this is decisive. I do not think the doctrine respecting the use of mechanical equivalents, is confined by the Patent Law to those elements which are strictly known as such in the science of mechanics. In the present advanced state of that science, there are different well-known devices, any one of which may be adopted to effect a given result, according to the judgment of the constructor. And the mere substitution of one of these for another, cannot be treated as an invention. It does not belong to the subject of invention, but of construction. One constructor may adopt a spring-catch, another a catch and spring; but whether he takes one or the other, is matter of judgment in construction, as long as both are designed to accomplish the same end, and both are in common use to accomplish it.

The substance of this invention does not consist in the identical devices used, but in a practicable and described mode of effecting certain operations; and when the patentee has described what those operations are, and one practicable mode of effecting them, he has enabled constructors to effect these operations, not only by the identical devices he employed, but by all other known substitutes. If this were not so, no patent for machinery, of the least complication, would be of any value. Now, the difficulty which attends the affidavits, on the part of the defendant, is, that the opinions given by them are not accompanied by any explanation of what the witnesses mean by principle, or mode of operation, or by any statement of what, in point of fact, they consider are the diversities between the two machines; or whether those consist in the substitution

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of one well-known mode of effecting a given movement, in place of another. And this is equally applicable to what they say respecting the means of revolving the shaft. They express an opinion that the means are different, and the practical result better. Mr. Eddy and Mr. Blanchard think the practical result not so good; and though they do not say the means are the same, they do say they are long and well-known means of revolving the shaft.

If I were to come to the conclusion that the defendant's mode of revolving the shaft was a real practical improvement, it would by no means follow that it would not be an infringement of the patent. Looking at the whole structure devised by the patentee, and covered by the first claim, the question would then be, if its substance was not used by the defendant, though he had improved it, by adopting a continuous, in place of an intermittent, motion. Very nice and difficult questions have been made concerning what are often called combinations, but the elements of which are not capable of being distinctly defined and separated. If a combination, properly so called, consist of two or more distinct things, and the patent is for combining them into one whole, it is familiar law, that if all are not used, the patent is not infringed.

But the first claim in this patent is not for such a combination. It is for an operative part of a machine, and in substance covers that operative part; just as a patent for an entire machine covers the whole machine. In some sense, it may be called a combination, for it consists of different parts united together, as an entire machine does. But it is not strictly and technically a combination, any more than an entire machine is. And it may be improved, and a patent taken for that improvement; and at the same time, the improvement cannot be used without the consent of the original patentee. And even where a strict combi-

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nation is claimed, if one of the elements of that combination is complex enough to admit of an improvement, without destroying its identity, such improved combination would still be an infringement. This case presents an illustration. The patentee claims the means of moving the gauge plate, in combination with the knife-shaft, and the means of revolving, fixing, and depressing it. This is technically a claim for a combination, and would not be infringed by a machine which should omit the motion of the gauge plate. But if that is used, the other element of the combination may be capable of being improved, without destroying its identity; and if thus improved, the whole combination, in the sense of the Patent Law, would be used.

Whether the change made by the defendant, in this case, goes beyond the mere substitution of one known device for another, so as to amount to a patentable improvement, or whether, if it does, it is still only an improvement of the thing patented, and so an infringement, are questions which it may be proper to raise hereafter, in the progress of the cause; but in the present state of the evidence, I do not see such grounds of doubt upon these points as ought to prevent the Court from protecting the right of the plaintiff, by requiring the defendant to keep an account and file a bond, with sufficient sureties, to pay such sums as may be finally decreed against him; and in default thereof, an injunction must issue. I make the order for an injunction conditional, because it is not suggested that the defendant has constructed, or is about to construct, any other machine than the one complained of; and if the plaintiff is made secure of receiving all the profits which may arise from the use of the machine until a final decree, he will be sufficiently protected in case it is decided that

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the defendant infringes on a right belonging exclusively to him. I have not thought it necessary particularly to examine the other claim in the specification.

G. T. Curtis, for the motion.

R. Choate, contra.

JAMES SWANSTON et al. vs. MARCUS MORTON.

A protest under the act of February 26, 1845, (5 Stat. at Large, 727,) being a commercial document, need not be drawn with technical accuracy; but it must state, distinctly, every ground of objection intended to be relied on; and none other can be relied on at the trial.

It must also show, distinctly, what is objected to.

THIS was an action of assumpsit, to recover from the defendant, who was formerly Collector of the customs for the port of Boston, certain duties alleged to have been illegally exacted by him. The District Attorney denied that the protest was sufficient. The regular duties on the computed cost of the article, as invoiced, amounted to \$646.66. Under the eighth section of the Tariff Act of 1846, the Collector had caused an appraisement to be made, and the appraised value exceeded the value declared on the entry more than ten per cent. The Collector required payment of the twenty per cent. additional duties provided for by the above-mentioned section. It was admitted that the proceedings on the appraisement were irregular, and the appraisement not made in conformity to law, and that the plaintiffs must recover, if they had made a sufficient protest. Upon the paper which contained the entry, the regular duties were computed, and the result

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stated to be \$646.66; and on the same paper were the following words and figures: "Penalty, \$6466.58 a 20, \$1293.31.

	646.66
Penalty,	1293.31
Referees fees,	10.00
Permit,	20

1950.17 paid."

In the accompanying paper, by the side of these words and figures was the protest, as follows:—

"We hereby protest against paying the additional penalty of twenty per cent., believing the entry and invoice presented by us to be the actual cost of the barilla."

The only objection made to the protest was, that it protested against the payment of a penalty, whereas the amount paid was not a penalty, but an additional duty.

CURTIS, J. The act of February 26, 1845, (5 Stat. at Large, 727,) contains the provision, "Nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of the said duties, setting forth, distinctly and specifically, the grounds of objection to the payment thereof." This is an important provision of law, and must be carefully construed, so as to secure the practical advantages to the government which it was designed to secure, and at the same time to embarrass as little as possible the transaction of this species of business. The protest must declare what is objected to, and what are the grounds upon which the objection is rested. I should not permit any ground, not distinctly and specifically set forth

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in the protest, to be relied on at the trial. Here, however, it is not alleged that the protest does not sufficiently state the ground of objection; but the defect alleged is in the description of the thing objected to. It is urged that the action is to recover back money paid as additional duties; but the thing objected to in the protest was a penalty. It is true the Tariff Act denominates it additional duty; but, it clearly appears, from the circumstances under which it was to be levied, that it was an additional duty, by way of penalty, for not declaring the true value. And if it were necessary to decide upon the strictly technical term appropriate to such a demand, I am by no means clear that it would not be the word penalty. But it is not necessary to go to this length. These protests are commercial documents; and though they must be certain and distinct, they need not conform to any technical rule. If this protest, taken in connection with the other contents of the paper on which it is written, and to which it refers, makes known what was protested against, it satisfies the statute in this particular.

That it does make this known, no reasonable man can doubt. It protests against payment of "the penalty of twenty per cent.;" and the same paper calls the additional duty a penalty in the place where it is computed. It was under the name of penalty that the Collector exacted the money, and by that name it was proper to call it in the protest. It is clear, it was against this payment of the additional twenty per cent., called by the officer of the customs, who computed and demanded it, a penalty, that the protest is directed. I hold it to be sufficient.

G. G. Hubbard, for plaintiffs.

Lunt, *District-Attorney*, for defendant.

Clarke v. Southwick.

EDWARD CLARKE *vs.* JAMES C. SOUTHWICK.

Certain mill-owners having, by articles of agreement, associated themselves for the purpose of constructing reservoirs, &c., to improve the flow of the stream, and agreed that there should be a lien on their respective estates for the share of the expenses which each was to pay: *Held*, that this agreement was an equitable lien, which each member who had paid more than his proportion might enforce, without joining the others; and that the defendant, having purchased certain of the mills, with notice of the lien, after the debts were incurred by the association, took the estates *cum onere*. Such a lien is not barred by lapse of less time than is sufficient, by the local law, to bar a suit for the foreclosure of a legal mortgage.

THE opinion of the Court, which sufficiently states the facts, was delivered by

CURTIS, J. This is a bill in equity, to establish and enforce a lien on certain mills, lands, and their appurtenances, belonging to the defendant. The facts upon which the lien is asserted are, that on the fifteenth day of April, 1837, articles of agreement, under seal, were entered into by certain persons who owned mills upon a stream of water in the town of Sutton, in the county of Worcester, the object of which was to associate themselves, under the name of the Sutton Water-Power Company, for the purpose of creating reservoirs of water, to render the stream, by which their mills were driven, more constant and full, for their common benefit; that the proprietors of six different mills were parties to this agreement; that they thereby agreed, among other things, that there should be a lien on their respective estates, to secure the faithful performance, by each to the other, of the covenants contained in the articles. Among these covenants was one, that the associates would pay all debts incurred in creating and managing this water

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power, in the proportions specified, one sixth part thereof being chargeable to each of the six mills.

The complainant was a member of this association, as one out of three owners of one of the mills; and two days after the execution of the articles, he became, by purchase from his co-tenants, sole owner thereof. The articles contained a provision, that, if either of the mills should be sold, the purchaser might become a member of the association.

Three of the mills were conveyed, after the execution of the articles, to the Sutton Woollen Mills, a manufacturing corporation, which became a member of the association; and, while thus a member, and through its action as such, large expenses were incurred in the purchase of lands, the erection of a dam, and liabilities for land damages, from a flowage, which, though in part paid by the association, through regular contributions for that purpose, was mostly left unpaid; and the complainant, as one of the members of the association, has been obliged to pay the residue; and he now seeks, by this bill, to charge upon three of the mills, formerly owned by the Sutton Woollen Mills, but now owned by the respondent, three sixths of what he has thus paid, being the proportions stipulated by the original agreement to be borne by the owners of those mills.

The first question made at the bar is, whether the articles created a lien on the real estate. Of this, I have no doubt. The parties covenant, each with the other, for the payment of all debts incurred in the execution of their common object; and then go on to bind, not only themselves, but "his and their respective estates hereinafter mentioned," to the faithful performance of all the provisions of the instrument; and after describing each estate, and the contributory share to be borne by it, they use this language: "meaning and intending hereby to create

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a lien upon, and to bind our said estates, so far as we may, either in law or equity, do the same," &c.

Whenever the owner of real property agrees, in writing, for a valuable consideration, that a lien for a debt or duty shall exist on that property, in the view of a Court of Equity, it does exist. Such an agreement is not executory merely, but so far as respects the parties, and those claiming under them as volunteers, or with notice, it is executed; it creates a trust, which this Court will enforce, and by means of it, work out, according to its own modes of proceeding, the payment of the debt, or the performance of the duty, which the parties have manifested their intention to have thus secured. The authorities in support of this position are numerous.

I will refer to some, in which the principles upon which this position rests, are most clearly stated.

In *Legard v. Hodges*, 1 Ves. Jr. 477, Lord Loughborough said: "I take the maxim to be universal, that wherever persons agree concerning any particular subject, in a Court of Equity, as against the party himself, or any claiming under him voluntarily, or with notice, a trust is raised."

In *Collyer v. Fallon*, 1 Turn. & Russ. 469, the principle is laid down — "Contract, with respect to a given matter, binds the property, as between the parties to the contract, and all claiming under them, with notice."

And in the recent case of *Malcolm v. Scott*, 3 Hare, 39, 46, 52, it is taken to be clear, that when you make out an agreement to give a lien, the lien exists. Upon this principle, *Burn v. Carvalho*, 4 M. & Cr. 702, *Hankey v. Vernon*, 2 Cox, 12, *Clarke v. Mauran*, 3 Paige, 373, *Parker v. Muggridge*, 2 Story, 334, and many cases in bankruptcy, from 1 G. & J. 13 to 2 M. & A. 224, have been decided.

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My opinion is, that the articles of agreement now in question, which in express terms declared that there was to be a lien on these estates, created an equitable lien, capable of being enforced through the power of this Court.

The next question is, whether this lien is capable of being enforced at the instance of the plaintiff. It is argued, that only the association or company has this lien. This depends on the intent of the parties, manifested in the instrument; and I do not so construe it. The lien accompanies the covenant, and is intended to secure its performance. The covenant, that each will pay his proportion of the debts, is a several covenant by each with each member. Its language is, "and the members of the said company, each for himself respectively, &c., does covenant, promise, and agree, each with the other, &c., for the due and faithful execution," &c. Whatever several rights the plaintiff has, are, therefore, intended to be secured, and, in a Court of Equity, are secured by the lien, which is co-extensive with the obligation of the covenant, and binds the lands, as that obligation bound the parties to it.

It has been argued, that the members were not liable *inter sese* until after an assessment made; but there is nothing in the instrument on which to rest this position. The covenant by each to discharge and pay his stipulated proportion of all debts, is absolute and unqualified. The words "assessed" and "assessment" do occur in the instrument, but only as synonymous with share or proportion; and there is nowhere any provision calling for any formal act of assessment as a condition precedent to the right of each member to have every other member pay his stipulated part of the expenses of the association.

It is true these debts were contracted while the Sutton Woollen Mills owned the three estates in question; and that corporation was not originally a member of the associa-

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tion, and did not execute the articles. But the articles contained a provision that any purchaser of either of these mills might become a member of the association, and the bill avers that this corporation did become a member. This averment of the bill is admitted to be true. Indeed, the very debts which the plaintiff has paid were contracted by that corporation as a member of the association. I am inclined to think that a purchaser of one of these mills, though he took his estate incumbered by the lien to secure the performance of this covenant, might exempt it from the charge for future debts by refusing to become a member of the association; but if he became a member, and actually participated in creating debts, I think the lien extended to his share of them. When he takes the title, it is charged with a lien, to secure the payment of the just contributory share of expenses which have been or shall be incurred, for the common benefit of that and five other estates. So far as expenses have then been incurred, they are clearly a charge on the land. Independent of any stipulation in the articles giving the purchaser a right to withdraw, and refuse to participate in future expenditures, it would be difficult to show that the estate would not be bound for them, even if he did not expressly consent to what was done. There are cases, in which, without any actual contract, equity will compel the owner of property to contribute to the cost of a work erected by another for their common benefit, as in case of a party wall. *Campbell v. Mesier*, 4 Johns. Ch. R. 334.

This principle has never been extended to works designed to improve the flow of a stream, for the advantage of all the mills upon it, and there are sufficient reasons why it should not be so applied; but I know of no reason why the owners should not make a contract, not only to build, but preserve and manage reservoirs and other works

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for the common benefit of their respective mills, and charge the expenses thereof, permanently, on their respective estates, so that any purchaser would take his title *cum onere*, and be liable to pay the share belonging to his mill, even if he expressly dissented from the expenditure. As already intimated, I do not consider these articles were intended to bind the estate of any purchaser for expenses incurred after the purchase, against his will; but I see no difficulty in holding that the lien, which existed on these three mills when the original members of the association sold them, secured not only the payment of what there had been, but of what thereafter should be, expended, with the assent of the purchaser.

It is true, that a purchase for a valuable consideration, and without notice, would take the estate discharged of the lien; but the bill avers notice to all the purchasers, including the defendant, and this averment is admitted to be true. My opinion is, that the Sutton Woollen Mills took these estates, charged with a lien for three sixths of the expenditures which had then been made pursuant to the articles, or which should thereafter be made with its assent; and that this lien was capable of being enforced by any member of the association.

It is urged, however, that this bill is defective, because the plaintiff has not joined the other members of the association. But they have no interest in this suit, the object of which is to charge on the defendant's estates, their contributory share. I am aware that formerly the rule was, that in a bill for contribution, all those liable to contribute must be joined, upon the hypothesis that each might assist the others in the taking of the account; but this rule has been found so inconvenient, and so little beneficial in practice, that, by an order made in 1841, it has been abrogated in England, (1 Dan. Ch. Pr. 331,) and under the fifty-third

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rule for the practice of this Court, I can have no doubt, that it is my duty to make a decree in the absence of those parties, as their joinder would defeat the jurisdiction, and a decree can be made without affecting their interests.

If there was any property of this association capable of being applied, and which, equitably, ought to be applied in payment of its debts, before resorting to the lien asserted by the bill, all the members would be necessary parties, because they would then have an interest, both in the account of the debts and of the property, and in its application. But there is no such property. The works which the association has erected for the improvement of these mills, cannot be sold without defeating the very object for which the association was formed. Every member has a right to have them preserved, and to have every other member pay his contributory share, in order that they may be preserved. So far from these works constituting a fund to be resorted to in relief of the contributors, they are the very object of the contribution, and equity requires it to be made in order that the original purposes of the parties may be fulfilled.

It is objected that the defendant may hereafter, by other suits, have other debts of the association charged on his estates, so that he is exposed to pay more than his just share, and thus be forced to seek for contribution himself, in another suit. If this were so, it would be a fatal objection; but the defendant not being a member of the association, and so not being personally liable, can never be forced to pay any more than three sixths of any debt, and so can never have any claim for contribution; for this proportion is what is justly and ultimately chargeable on his estates.

These are all the objections growing out of the supposed defect of parties, which have been assigned at the bar, and, in my opinion, they are not tenable.

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The defendant insists that this is a stale claim; that the plaintiff has been guilty of such laches that this Court will not lend its aid to enforce the lien. He relies on the doctrines of Courts of Admiralty respecting maritime liens, and several decisions on that subject were cited. But there is no occasion to resort to analogies drawn from another branch of jurisprudence, because equity has its own settled rules and principles which govern the case. First of all, equity protects *bona fide* purchasers without notice. Against such a purchaser it does not enforce such a lien. This leaves for consideration, only the rights of the party creating the lien, and those who succeed to those rights. As against them, an equitable mortgage is like a technical legal mortgage. If there be a statute of limitations, barring the rights of a legal mortgagee after the lapse of a certain time, equity will follow the law, and hold the same time a bar to a bill to foreclose an equitable mortgage. But it will not distinguish between an equitable and a legal mortgage in this particular. *Hughes v. Edwards*, 9 Wheat. 494; *Lingan v. Henderson*, 1 Bland, 282; *Moreton v. Harrison*, 1 Bland, 491; *Shiratz v. Nicodemus*, 7 Yerger, 9. The fact, that the action at law for the debt, is barred by the statute is not material in equity, as it is not at law. *Thayer v. Mann*, 19 Pick. 535; *Baldwin v. Norton*, 2 Con. R. 163. Keeping these principles in view, it is plain that the Court cannot refuse relief in this case, either by reason of the Statute of Limitations, or upon the ground of laches. By the law of Massachusetts, twenty years adverse possession bars an action at law to foreclose a mortgage. Less than twenty years is not sufficient to afford a positive bar to a bill to foreclose an equitable mortgage, on land in that State. Neither is this a case in which laches can be imputed to the plaintiff. He paid these moneys from time to time, between 1839 and

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1843, and in 1843 he brought a suit in the State Court to enforce this lien. The suit failed, for want of a sufficient equity jurisdiction, in October, 1847, and in April, 1848, this bill was filed. Whatever might be said of this, if the plaintiff were seeking to call into action the discretionary authority, which this Court exercises to give relief concurrently with Courts of Law, as in bills for the specific performance or rescission of contracts, there can be no pretence for saying, that this lapse of time has affected the right of a creditor, to obtain payment of his debt, through an equitable mortgage on land. Nothing short of such time and circumstances as raise a presumption of payment can avail the debtor, or discharge the land.

A decree is to be entered, referring the cause to a Master to state an account, with directions to ascertain what debts of the association have been paid by the plaintiff, in full, and what in part only, if any, and also what debts of the association have been paid in full by the owners of the three estates held by the defendant, and what in part only, and let the report show when all such debts were contracted and paid.

**CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.**

RHODE ISLAND DISTRICT, NOVEMBER TERM, 1852.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. JOHN PITMAN, District Judge.

JOHN S. DESPAN vs. JAMES N. OLNEY.

A military officer, acting under the law martial, is justified by an order from a superior officer, apparently within the scope of his authority.

If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable.

THIS was an action of trespass. It appeared, that in June, 1842, the plaintiff was a citizen of Rhode Island, residing at Pawtucket; and that the defendant came to his shop, in that village, accompanied by several files of soldiers, arrested the plaintiff, and after holding him in confinement for a few hours in a neighboring tavern, had him conveyed to the city of Providence, where he was confined for several days, and then permitted to return home.

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The defendant pleaded a statute of limitations of Rhode Island, which barred all actions, for acts done while the State was under martial law, provided such acts were intended to preserve the peace of the State, and to aid the people and government thereof against the open or suspected hostility of the person complaining; and issue was taken and joined upon the averment of the plea, that the act in question was done with that intent.

It was shown that the defendant was a native born citizen of Rhode Island, but resided at Brooklyn, in the State of New York; that in June, 1842, he came to Providence, and volunteered his services, and received a commission as captain from the Governor, and was ordered to Pawtucket, in consequence of some alarm excited by disturbances there and in the neighborhood; that very soon after his arrival there, an order was given to him by Major-General Anthony, who was the highest in military command at that time and place, to arrest the plaintiff; that he executed this order without any unnecessary violence, and it was admitted that he bore no personal malice against the plaintiff, with whom, it did not appear, he had any acquaintance. The act of the legislature of Rhode Island, placing the State under martial law, was then in force. It was shown that the plaintiff, some weeks before the time in question, had commanded a military company, raised to support what was called the people's constitution, and was present, with his company, when an attack was made on the arsenal at Providence. But it also appeared, that, after the President of the United States had recognized the government organized under the original charter of Rhode Island to be the lawful government of the State, the plaintiff had not taken any active part against that government, and had, on some occasions, used his influence to prevent others from doing so. But

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it did not appear that this was known, either to the plaintiff, or to General Anthony.

The District Judge did not sit on the trial.

CURTIS, J., directed the jury as follows.

The question for you to try is, whether the act of the defendant, in arresting the plaintiff, was intended by the defendant to preserve the peace of the State, and to aid the people and government thereof against the open or suspected hostility of the plaintiff. You perceive, it is a question of the defendant's intent; and the only mode of determining it is, to consider what he did, and under what circumstances the act was done; from these facts, which are shown by the evidence, you are to infer what the purpose or intent of the defendant was; a fact, not susceptible of being directly proved by evidence, because it is a state of mind. It appears by the act of assembly which has been read, that martial law then existed in Rhode Island. It has been determined by the Supreme Court of the United States, in a case which went up to that Court from this district, that the legislature of a State has power to proclaim martial law, whenever in its discretion, the public safety demands this extreme measure. And also, that, as the executive department of the Government of the United States had recognized the Government of Rhode Island, organized under its charter, as the only lawfully existing government of the State, all other departments of the government of the Union were bound thereby. You will, therefore, take it to be the law in this case, that martial law had been rightfully proclaimed, and did exist, at the time when the acts complained of were done. But the existence of martial law does not authorize general military license, or place the lives, liberty, or property of the citizens of the State under the unlimited control of every holder of a military commission.

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It is not needful, in this case, to point out the limits of the authority which it confers. It is enough to say, that under the issue you are trying, the existence of martial law is not, of itself, a justification of the defendant. He must also satisfy you that the act done by him, under that law, was intended by him to preserve the peace of the State, and to aid the existing government, and not from recklessness, or a love of power, or to gratify any bad passion. Still, the fact that martial law existed, has a most important bearing on the question of the intent of the defendant. He held a commission as captain. He received an order from his commander. He was bound to obey all lawful orders. And if this order was one which, upon its face, was lawful, and he did no more than execute it, you will consider whether it would not be proper to conclude, that he acted simply with an intent to do his duty, unless some other intent appears. Now, as martial law existed, and as Major-General Anthony had authority under that law, for sufficient cause known to him, to cause the arrest of the plaintiff, the order to do so was, upon its face, a lawful order. And I do not think the defendant was bound to go behind an order, thus apparently lawful, and satisfy himself, by inquiry, that his commanding officer proceeded upon sufficient grounds. To require this, would be destructive of military discipline, and of the necessary promptness and efficiency of the service.

It is a general principle, that an executive officer is justified by his precept. If the court from which it issues has jurisdiction, and the precept is regular on its face, it is neither the right nor the duty of the civil officer to inquire further. Something like this is true of a military officer. If he receive an order from his superior, which, from its nature, is within the scope of his lawful authority, and nothing appears to show that that authority is not lawfully

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exerted in the particular case, he is bound to obey it; and if it turns out, that his superior had secretly abused or exceeded his power, the superior, who is thus guilty, must answer for it, and not the inferior, who reasonably supposed he was doing only his duty. And therefore, if in this case, you find, as matter of fact, that the defendant did receive from his commander, an order to arrest the plaintiff, and that there was no fact known to the defendant, which would have made the arrest an abuse of power by General Anthony, you will then take it that the defendant was bound to obey that order, and you will consider whether he did not act from this motive. If he did act simply from a desire to do his military duty, you will then consider whether his intent was to preserve the peace of the State, and aid the people and government thereof, against the open or suspected hostility of the plaintiff.

The defendant had volunteered his services as a soldier. No evidence has been given, tending to show that he had any motive in doing so, except the ostensible one, to aid the existing government in their unhappy troubles. And if his object, in entering the service, was to preserve the peace of the State, and aid its government against open or suspected hostility, you will inquire whether this general purpose did or did not actuate him, in doing the act complained of; whether there is any ground to impute to him any other motive; if you find none, and I must say I know of no evidence of any other, or any thing tending to show that he did act with any other intent, then you ought to find this issue in his favor. The contest, which so deeply agitated this State, though long terminated, may have left deep impressions upon your minds; and, out of the jury-box, you might differ very widely, in opinion, respecting its merits. But, fortunately, its merits are not here to be tried. You may all have a fixed opinion, that

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the government, under the charter, was in the right, or that it was in the wrong; or you may be quite unable to agree on that point; and yet, you may be able to agree, and be bound, as conscientious men, to agree upon a verdict in this case. If you find the defendant's intent was not what he has stated in his plea, you should convict him, though you are of opinion that the charter government, whose soldier he was, was entirely to be approved. And if, on the other hand, you believe he did the act complained of with the intent alleged, then you are bound to acquit him, though you should all be convinced that that government was wrongfully sustained.

The jury found for the defendant.

Weeden, for plaintiff.

Blake, for defendant.

WILLIAM H. GREENE *vs.* NATHAN M. BRIGGS *et al.*

The words, "the law of the land," in the tenth section of the first article of the Constitution of Rhode Island, mean due process of law; in which is included the right to contest the charge and be discharged, unless it is proved.

An act of the legislature of that State, which authorizes a criminal prosecution upon a complaint against no person in particular, and not containing a charge of the substantive facts necessary to constitute the offence, is inoperative, because such a complaint is not due process of law.

The legislature cannot make the right to a trial by jury, in a criminal case, dependent on giving a bond, with surety, for the payment of the penalty and costs.

An order, made by a justice of the peace, upon a matter not within his jurisdiction, is merely void.

He must not only have jurisdiction over the subject-matter, but of the process; and if the law, conferring jurisdiction, is in conflict with the Constitution, so far as it respects the process, the jurisdiction does not exist.

THIS was an action of replevin.

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The defendants, in answer thereto, filed the following avowry:—

“And the said defendants come and defend the force and injury when, &c., and well avow the taking of the goods and chattels in the declaration aforesaid above-mentioned, in the said place in which, &c., and the detention thereof, &c., and justly, &c., because they say that the said Nathan M. Briggs now is a police constable of the city of Providence, in said district, and for a long time before, namely, ever since the 25th of February, A. D. 1852, was a police constable as aforesaid; and that on the third day of September, A. D. 1852, at said Providence, Daniel K. Chaffee, George W. Wightman, and Warren G. Slack, all then and there voters in said Providence, did, before Samuel W. Peckham, Esq., then and there one of the Justices of the Court of Magistrates of said Providence, make complaint under oath, in writing, in the words and figures following, to wit:

“See the paper hereunto annexed, marked A, which is hereby made a part of this plea.

“Whereupon the said Samuel W. Peckham, Esq., Justice as aforesaid, did then and there issue a warrant of search, in the words and figures following, to wit:

“See the paper hereunto annexed, marked B, which is hereby made a part of this plea.

“And that, by virtue of said warrant, the said Briggs did then and there proceed to search the premises described in said warrant, and did then and there seize the goods and chattels aforesaid, and did then and there convey them to some proper place of security; and that the said Briggs did then and there summon Moses K. Holbrook, of said Providence, as the owner or keeper of said goods and chattels, to appear at the next regular session

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of said Court of Magistrates, to be holden on the 4th day of September, A. D. 1852, at which time and place said Holbrook appeared.

“And that the said Briggs, on the 4th day of September, A. D. 1852, at said Providence, did return said warrant to said Court of Magistrates, with his doings thereon, in the words and figures following, to wit: See the paper hereunto annexed, marked C, which is hereby made a part of this plea. And that, on the 7th day of September, A. D. 1852, at said Providence, said Holbrook appeared before said Court in person, and then and there made answer to said complaint, in the words and figures following, to wit: See the paper hereunto annexed, marked D, which is hereby made a part of this plea.

“And that the said Greene, on said 7th day of September, 1852, at said Providence, made claim, in writing, before said Court, to a portion of said goods and chattels, in the words and figures following, to wit: See the paper hereunto annexed, marked E, which is hereby made a part of this plea.

“And that one Albert A. Hall, of East Greenwich, in said District, on the — day of September, A. D. 1852, at said Providence, made claim, in writing, before said Court, to a portion of said goods and chattels, in the words and figures following, to wit: See the paper hereunto annexed, marked F, which is hereby made a part of this plea. And that said two last-mentioned claims were then and there ruled out by said Court, on the ground that said Court would take notice of no claim to said goods and chattels, unless the claimant appeared in person.

“That, on said 7th day of September, A. D. 1852, at said Providence, and before proceeding to trial, the said complainants moved said Court of Magistrates, then and there to amend said complaint, by inserting the words

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'then and there' before the words *'intended for sale;'* and also the words, *'to the complainants unknown,'* after the words *'by a person;'* which motion was then and there opposed by said Holbrook, (who was then and there before said Court in person,) by his said attorney, Thomas A. Jenckes, Esq.; and the said Holbrook then and there moved said Court, by his said attorney, to quash said complaint; which said last-mentioned motion was then and there dismissed by said Court, and said first-mentioned motion was then and there granted by said Court, and said amendment was then and there made by said Court. See said paper, hereunto annexed, marked A, with said amendment interlined, which is hereby made a part of this plea.

"That, on the 15th day of September, A. D. 1852, at said Providence, and subsequent to the introduction of said complainant's testimony, by which it appeared that the store on Broad street was entered about five o'clock in the afternoon, the doors being open; and that the door of the Orange street store was broken open about seven o'clock in the evening of the third of September, 1852, and that the goods and chattels aforesaid were carried from both stores between nine and ten o'clock the same evening, said Holbrook, who was then and there present in person, moved said Court, by his said attorney, to quash said complaint, which said motion, upon argument, was, on the 20th day of September, A. D. 1852, overruled by said Court.

"That afterwards, to wit, on the 27th day of September, A. D. 1852, at said Providence, said Court, after hearing the pleadings, evidence, and arguments of said parties, rendered judgment thereon, in the words and figures following, to wit: See the paper, hereunto annexed, marked H, which is hereby made a part of this plea.

"And that said Court thereupon, on the 27th day of September, A. D. 1852, at said Providence, delivered to

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said Briggs an order, in the words and figures following, to wit: See the paper, hereunto annexed, marked I, which is hereby made a part of this plea.

"And this they are ready to verify. And so the said defendants well avow the taking and detention aforesaid, and pray judgment and a return of the same goods and chattels to be adjudged to them, and that the said Briggs may proceed and destroy said liquors, in the presence of said Hudson, as ordered by said Court of Magistrates, and for their damages and costs. By their attorney,

"J. M. CLARKE."

(A.)

COMPLAINT AND SEARCH-WARRANT.

To Samuel W. Peckham, Esquire, one of the Justices of the Court of Magistrates, in the City of Providence, in the County of Providence, in the State of Rhode Island, and Providence Plantations.

Daniel K. Chaffee, Warren G. Slack, and George W. Wightman, voters in the city of Providence, in said county, on oath complain, in the name and behalf of the State, that they have reason to believe, and do believe, that, at said Providence, on the third day of September, 1852, with force and arms, spirituous or intoxicating liquors are kept or deposited, and then and there intended for sale, by a person, to the complainants unknown, who is not authorized to sell the same in said Providence, under the provisions of the act entitled "An Act for the suppression of drinking-houses and tippling-shops," in the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) together with

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the cellars and yards belonging to said buildings, against the statute, and the peace and dignity of the State.

Wherefore they pray advice, and that process may issue, and that the said premises may be searched, and that the owner or keeper of said liquors may be summoned to answer to this complaint, and be further dealt with relative to the same, according to law.

Dated at Providence, this 3d day of September, A. D. 1852.

D. K. CHAFFEE,
GEO. W. WIGHTMAN,
WARREN G. SLACK.

Providence, sc.

In Providence, this 3d day of September, A. D. 1852, personally came D. K. Chaffee, Geo. W. Wightman, and Warren G. Slack, subscribers to the above complaint, and made oath to the truth of the same. Before me,

SAMUEL W. PECKHAM,
Justice of the Court of Magistrates.

(B.)

STATE OF RHODE ISLAND, AND PROVIDENCE PLANTATIONS.

Providence, sc.

To the Sheriff, his Deputy, or to either of the town Sergeants, or Constables in the County of Providence:
Greeting.

[L. S.] Complaint having been made to me, on oath, as above written, you are therefore hereby required, in the name of said State, forthwith to proceed to search the premises above described, to wit: the building number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A.

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Howland and Solomon Pareira,) and the cellars and yards belonging to said buildings, in the city of Providence; and if any such liquors are found therein, to seize the same, and convey them to some proper place of security, and there keep them until final action is had thereon; and to summon the owner or keeper of said liquors (if he shall be known to you) to appear at the next regular session of the Court of Magistrates, on the 4th day of September, 1852, at 8 o'clock, A. M., to show cause, if any he have, why said liquors should not be adjudged forfeited, and be destroyed, and he be adjudged to pay a fine of twenty dollars, to the use of the State, and all costs that shall accrue hereon. And for so doing, this shall be your warrant. Hereof fail not.

Given under my hand and seal, at Providence, in said County, this 3d day of September, in the year 1852.

SAMUEL W. PECKHAM,

Justice of the Court of Magistrates.

(C.)

Providence, sc.

Sept. 3d, 1852.

I have taken aid and diligently searched the within described premises, and have found and seized the following described liquors, viz: to wit, in the buildings number 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street, the following described liquors, namely: *Here follows description of liquors.*

Also, the liquors, hereafter described, in the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira, as follows, namely: *Here follows description of liquors.*

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And have summoned Moses K. Holbrook, as the owner or keeper of said liquors, to appear before the Magistrates' Court, on the 4th day of September, 1852, at 8 o'clock, A. M.

NATHAN M. BRIGGS, *Police Constable.*

On the 7th of September, (by paper referred to in plea marked D,) Moses K. Holbrook, of Providence, summoned by the officer who made service of the warrant, averred, before the Court of Magistrates, that he held the liquors seized in the building on Broad street, as the agent of William H. Greene, of New York, on storage; that no sale had been made, nor was any sale intended to be made, since the 19th of July last; and that he made no appearance as the owner, keeper, or possessor of the other liquors.

On the same day, William H. Greene, of New York, filed his claim, in writing, (marked E,) in said Court, to said liquors, averring that they were deposited in said buildings on storage, before the 19th of July, 1852; and that they were not kept or deposited for sale in the city of Providence, contrary to the provisions of the act under which they were seized, and demanded that they be returned to him.

On the same day, A. A. Hall, of East Greenwich, filed his claim, in writing, (marked F,) in said Court, claiming one cask of native wine, making the same averment as that made by Greene, and demanded that said cask be returned to him.

On the 27th day of September, the Court of Magistrates entered the following decree :

(H.)

Be it remembered, that, on the 3d day of September, 1852, the following spirituous and intoxicating liquors, to

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wit: (*here follows a description of the liquors,*) were seized, upon a search-warrant, issued by Samuel W. Peckham, one of the Justices of the Court of Magistrates, in the city of Providence, in said county, and one of the Justices of the Peace for said county, on the complaint of D. K. Chaffee, George W. Wightman, and Warren G. Slack, voters in said city, in writing, in the name and behalf of the State, setting forth that, with force and arms, at said Providence, on the 3d day of September, 1852, &c., &c., (following the language of the warrant.)

And Moses K. Holbrook, the person summoned by the officer as the owner or keeper of said liquors, personally appeared before said Court of Magistrates, as the keeper of the liquors seized in store No. 81 Broad street, but not as the keeper of the other liquors seized on said warrant.

And now, on this 27th day of September, 1852, upon a trial of said complaint and warrant, and after a full hearing of the evidence adduced, and arguments of counsel for the complainants, and for said Holbrook, it is adjudged by said Court, that the said Moses K. Holbrook is the keeper of all said liquors; and that it not having been shown to the Court, by "satisfactory proof, that said liquors are of foreign production; that they have been imported under the laws of the United States, and in accordance therewith; that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe;" and it being the opinion of the Court, that said liquors have been "kept and deposited for the purposes of sale, contrary to the provisions of said act," said liquors are adjudged forfeited, and are ordered to be destroyed, in the presence of William H. Hudson, who is appointed to witness the destruction thereof; but the said Moses K. Holbrook, having withdrawn himself from this Court, and the said act not

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providing any way for the Court to keep or bring him before them, the Court cannot impose upon him the fine provided therein.

On the same day, the Court of Magistrates issued the following *order to destroy*.

(I.)

Providence, sc.

[L. S.] To the Sheriff, his Deputy, or to either of the town Sergeants or Constables in the County of Providence: Greeting.

Whereas, the following described spirituous or intoxicating liquors, to wit, (*here follows a description of the liquors,*) have been seized, on a warrant of search issued by Samuel W. Peckham, one of the Justices of the Court of Magistrates, in the city of Providence, on the complaint of Daniel K. Chaffee, George W. Wightman, and Warren G. Slack, voters in said city of Providence, according to the provisions of the eleventh section of an act entitled "An Act for the suppression of drinking-houses and tippling-shops," in the building No. 81 Broad street, and the buildings in the rear thereof, and connected therewith, running back to Middle street; also, the building connected therewith on Orange street, (being the building between the buildings occupied by Henry A. Howland and Solomon Pareira,) together with the cellars and yards belonging to said buildings, in said city of Providence. And whereas, Moses K. Holbrook, the owner or keeper of said liquors, seized as aforesaid, having been duly summoned to appear before said Court, has appeared before said Court, and has failed to show, by satisfactory proof, to said Court, that said liquors are of foreign production; that they have been imported under the laws of the United States, and in accordance there-

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with ; that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe ; and whereas, in the opinion of said Court, said liquors have been kept and deposited for the purpose of sale, contrary to the provisions of said act, said liquors have been, by said Court, adjudged forfeited, and ordered to be destroyed, in pursuance of the provisions of said act.

You are, therefore, hereby ordered to destroy said liquors, in the presence of William H. Hudson ; and for so doing, this shall be your authority. Witness, Francis E. Hoppin, at said Providence, this 27th day of September, A. D. 1852.

CHARLES HART, *Clerk.*

The plaintiff demurred to this plea, as insufficient in law to authorize the taking of said goods and chattels by said defendants, in the manner set forth in their plea ; and the defendant joined in demurrer.

CURTIS, J. This is an action of replevin for a quantity of wine and spirits, alleged to have been unlawfully taken and detained by the defendants, who justify the taking and detention by virtue of certain proceedings set forth in their avowry. These proceedings depend, for their validity, upon an act of the General Assembly of the State of Rhode Island, passed at its May session in the year 1852, and entitled "An Act for the suppression of drinking-houses and tippling-shops."

The plaintiff, having demurred to the avowry, insists that some of the provisions of this act, necessary to maintain the validity of these proceedings, are in conflict with the Constitution of the State, and therefore, void ; and so the taking and detention complained of are not justified.

The plaintiff is a citizen of the State of New York.

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Under the Constitution and laws of the United States, he is entitled to come into this court, and find here a remedy for any legal wrong done to him by citizens of Rhode Island. An adjudication upon his rights may, and in this case does, involve important questions, arising under the Constitution and laws of the State ; but in such a case, it is our duty to determine them ; a duty, which we should neither seek nor avoid, but perform.

The Constitution of Rhode Island (art. 1, sect. 15,) declares —

“ The right to the trial by jury shall remain inviolate.”

The 10th section of the same article is as follows : —

“ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ; to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining them in his favor, to have the assistance of counsel in his defence, and shall be at liberty to speak for himself ; nor shall he be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.”

Taking these two sections together, it may be said of them in general, that while the 15th section recognizes the existence of the right of trial by jury, and makes effectual provision for its preservation, as it existed when the Constitution was formed, the 10th section declares, not only that this right is to exist in all criminal cases, but is to be accompanied by certain incidents and modes of proceeding, which are therein prescribed and defined. In other terms, in civil causes, a trial by jury is to be had in those classes of cases in which it had been practised, down to the time when the Constitution was formed ; and such trial is to be substantially in accordance with such modes of proceeding as had then existed, or might thereafter be

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devised by the legislature, without impairing the right itself. But in all criminal cases, the right to a trial by jury, accompanied by the other privileges enumerated and defined, is absolutely to exist.

In order to decide whether those parts of this act, necessary to sustain the avowry, are in conflict with these fundamental laws, we must have a clear view of what the act contains; and, as it provides for modes of proceeding quite anomalous, and some of its clauses need construction, I shall begin by stating what these parts of the act, in my judgment, authorize and require: and I shall then consider, whether the proceedings, thus authorized and required, are in harmony with the Constitution of the State.

Under this act, three voters, in the town or city where the complaint is made, may make a complaint, in writing, under oath, to some justice of the peace, setting forth that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited and intended for sale in that town or city, by some person not authorized to sell the same under the provisions of the act. It is not required that any particular person should be named in the complaint, as the person intending to sell such liquors contrary to law, nor was any person in fact named in the complaint which was the foundation of the proceedings in question. Upon the filing of such a complaint, the justice of the peace is to issue a warrant of search, directed to the sheriff, his deputy, the town sergeants, or constables in the county, one of whom is to proceed to search the premises described in the warrant; and if any spirituous or intoxicating liquors are there found, he is to seize, secure, and keep them, until final action shall be had thereon. The officer is further required to summon the owner, or keeper of the liquors seized, if known to him; but

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there is no other provision for giving notice to the owner or possessor, prior to an adjudication of forfeiture. There is a provision, that in case the owner is unknown to the officer, the liquors shall not be destroyed, until they shall have been advertised for two weeks, to enable the agent of any town, duly authorized to sell such liquors, to appear and claim them; and upon making due proof of title, the liquors are to be delivered to him, and not destroyed. But this has no application to any other owner, and the law expressly requires the justice to adjudge a forfeiture, if the owner fail to appear.

Upon the return of the warrant, if the owner or keeper do appear, and the justice is of opinion that the liquors have been kept or deposited for sale, contrary to the provisions of the act, he is to adjudge a forfeiture, cause them to be destroyed, and inflict a fine of twenty dollars; or, if this fine be not paid, imprisonment for thirty days, upon such owner or keeper. An exception is made in favor of imported liquors, contained in their original packages; but the burden of proof is put upon the party appearing, to make out this defence. If the person claiming the liquors shall appeal to the Court of Common Pleas, he is required to enter into a recognizance, in a sum not less than two hundred dollars, with good and sufficient sureties, conditioned, among other things, that he will pay all fines and costs that may be awarded against him; and if the final decision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of the act, and the quantity seized exceed five gallons, he is to be adjudged "a common seller of intoxicating liquors," and punished as such, by a fine of one hundred dollars; or, in default of its payment, by imprisonment for sixty days; and he is also subjected to increased penalties on a second conviction.

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On reviewing these proceedings, it will be seen that, in order to obtain a trial by jury, the party must give security, in a sum not less than two hundred dollars, with two sufficient sureties, to pay all fines and costs which may be adjudged against him; and must subject himself to the hazard of having the fine, inflicted by the justice of the peace, increased fivefold, if the quantity of liquor seized should exceed, as in this case it did exceed, five gallons.

To require security for the payment of the penalty and costs, as a condition for having a trial, so far as I am informed, is a novelty in criminal jurisprudence; and, in my opinion, it is not only essentially unjust, but in conflict with that clause of the Constitution which secures the accused from being deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. Natural right requires that no man should be punished for an offence, until he has had a trial, and been proved to be guilty; and a law which should provide for the infliction of punishment, upon a mere accusation, without any trial, if the accused should fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed, by all just minds, as tyrannical; for it would treat the innocent, who are unable to furnish the required security, as if they were guilty, and would punish them, while still presumed innocent, for their poverty, or want of friends.

And it is equally clear, that such a law would not be "the law of the land," within the settled meaning of that important clause in the Constitution. Certainly this does not mean any act which the Assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American Constitutions, has been, that they require

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"due process of law;" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it is proved. Lord Coke, giving the interpretation of these words in *Magna Charta*, 2 Inst. 50, 51, says, they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation. *Hoke v. Henderson*, 4 Dev. R. 15; *Taylor v. Porter*, 4 Hill's R. 146, 147; 3 Story, Com. on the Const. 661; 2 Kent, 13, n.

It follows, that a law, which should preclude the accused from answering to and contesting the charge, unless he should first give security, in the sum of two hundred dollars, with two sufficient sureties, to pay all fines and costs, and which should condemn him to fine and forfeiture, unheard, if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exertion of the legislative power.

And if this would be the character of a law, which made the right to any trial dependent on such a condition, can it be maintained, that to prescribe such a condition, does not impair the right to a trial by jury. In such a case, the appeal has annulled the sentence of the justice of the peace. The accused is presumed to be innocent. He has had no such trial as he has a right to have. He now claims this particular kind of trial, as the prescribed constitutional means of determining whether he is to be punished. A condition, which would impair his right to any trial, if prescribed as the condition of his having any, impairs his right to this trial, if prescribed as a condition for his having it.

The 14th section of the 1st article of this Constitution declares:—

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"Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity, which is not necessary to secure an accused person, shall be permitted."

Undoubtedly, this clause has reference chiefly to acts of severity against the person of the accused. But it not only contains the great principle of the presumption of innocence, until the accusation is proved, but points out the security of the person, that he may be tried, as the only just or admissible reason for exercising any control over one still presumed to be innocent. And in my judgment, any law which disregards these principles, and introduces a new object, namely, the security of the payment of the fine and costs, and denies a trial by jury, unless the security is given, does not allow the right to such a trial to remain unimpaired. If this were not so, there would be no limit to legislative control over this right; for if one onerous condition may be imposed, so may any number, until the right becomes so difficult of attainment, that it ceases to be a common right, and can be enjoyed only by a few.

I find it equally difficult to reconcile the increase of penalties, upon a conviction after an appeal, with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated, by the accused having claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be

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founded on the exercise of that right? Here, also, it is manifest that this right is not secured by the Constitution; but is wholly under the control of the legislative power, if it can annex penalties to the exercise of the right.

These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process, and the judicial action under it, are directed both against the offender and his property. It is true the warrant does not require the officer to arrest any one, but only to seize and hold the property, and summon the owner or keeper, if known to him. But the arrest of property, to compel an appearance, is a known and effectual mode of proceeding against the owner of that property. Indeed, all mesne process, both civil and criminal, which results in giving bail for an appearance, is only a mode of binding a certain amount of property to a forfeiture on non-appearance. And when this law provides that the property is to be seized and detained, and adjudged forfeited, if the owner or keeper fail to appear, and if he do appear, that he shall be fined or imprisoned, if found guilty, it has brought into action a criminal process both against the owner and his property. That spirituous or intoxicating liquors are still property, notwithstanding this act, is certain. The act nowhere declares the contrary; and it recognizes them as property, by providing for the appointment of public agents, to buy and sell them, by expressly declaring that they may lawfully be held by chemists and others, and by not interfering with the title to them, under any circumstances, unless they are held, in some town in the State, for sale within that town. Indeed, the very terms employed to describe the judgment to be entered by the justice of the peace, "they shall be

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adjudged forfeited," "and the owner shall pay a fine," &c., are applicable only to property, and clearly imply that there is deemed to be some title to be divested, something for such a judgment to operate upon, and something which, until forfeiture, had an owner.

This being a criminal prosecution, directed against person and property, having for its end both fine or imprisonment and forfeiture, it becomes necessary to compare the law, authorizing this prosecution, with another requirement of the 10th section of the 1st article of the Constitution of the State, already quoted. The accused is "to be informed of the nature and cause of the accusation." This act does not require that any particular person should be charged; and in the case at bar, the complaint charges no one. It merely sets forth that the complainants have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited in several buildings which are mentioned, or in the yards or cellars thereto belonging, and are intended for sale in the city of Providence, by a person not authorized to sell the same. Whether these particular liquors, or others seized at the same time, and claimed by different persons, were referred to; whether the plaintiff, who owned these liquors, or some other person, in whose care they were left, had this unlawful intent, is not stated or shown by the complaint. There being no accusation whatever against the plaintiff, how can he be said to be informed of its nature and cause. When the Constitution requires that the accused should be informed of the nature and cause of the accusation, it clearly implies that there is to be an accusation against him. An accusation against another, or against no one in particular, is not such an accusation as will satisfy this clause of the Constitution. It stands in the same article which demands a conformity to "the law of the land," that is, due

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process of law, and should be interpreted as requiring that certainty which the common law has deemed essential to the protection of the accused. Certainty, in respect to the person charged, is not the least essential particular to which the constitutional requisition extends. *Sandford v. Nichols*, 13 Mass. R. 286; *Reed v. Rice*, 2 J. J. Marsh. R. 45; *Commonwealth v. Davis*, 11 Pick. R. 432; *Commonwealth v. Phillips*, 16 Pick. R. 211. If the complaint had charged the owner of particular liquors, so described as to be capable of being distinguished from all others, with an unlawful attempt to sell them, perhaps this might be sufficient; though, when it is borne in mind that this is a proceeding *in personam*, as well as *in rem*, such a mode of presentment would be novel, especially as applied to a case in which the unlawful intent of a particular person is the substance of the offence. But here it does not appear the owner was intended to be charged. The complaint alleges only that some person has this unlawful intent; but whether the owner, or some person to whom he had confided the possession, or a mere wrongdoer, who had possession, does not appear. Nor is there any description of the property, capable of distinguishing it from all other of like kind, and, consequently, of identifying the owner, if he should appear, as the person intended to be charged. The only description given is, that the property is liquors, spirituous or intoxicating; and that they are in one or all of three storehouses mentioned in the complaint, or in the cellars or yards belonging thereto. If it should turn out, as it did in this case, that more than one person had, or claimed to have, such liquors, in one of those places, how is the accusation to be treated, and which claimant is to be selected as the one to be tried, and who is to make the selection; or, under a complaint charging a person, to the complainants unknown, with a criminal intent, is a trial

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to be had of all claimants, who may appear, however numerous they may be? The complainants having sworn that some one person is believed by them to be guilty, is the justice to go on and try all comers, till he finds some one guilty, and there stop, and discharge the rest, or proceed and convict two or three, or any other number, if he find evidence enough, under a complaint against one only?

But this is by no means the only difficulty. The accused has an absolute right to a trial by jury. He has, also, a right to be so charged, that when that trial takes place, the jury shall pass upon the whole charge, so far as it involves matter of fact, and under the direction of the court, shall apply the law to all mixed questions of law and fact.

Now, if the owner of liquors seized, reach a jury trial by an appeal, and the quantity of liquors seized exceed five gallons, the court is required to adjudge him "a common seller of intoxicating liquors," and he is to be punished accordingly. But the complaint does not charge him with being such a common seller, nor with having and intending to sell, over five gallons; and no such fact is required to be, or can be put to the jury, to be tried. Yet, upon this fact, the judgment that he is guilty of a distinct offence, and the higher punishment appropriate to that offence, are rested. So that he is to be convicted of this higher offence without being charged with it, and without a trial by jury, of one of the facts essential to constitute it.

It is urged, however, that nevertheless, this may be a valid proceeding against the property, although the court could not thus convict the person. If this were simply a proceeding to forfeit property, it would nevertheless, be a criminal prosecution within the meaning of this clause in the Constitution; and the owner would be entitled to a

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trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rules of the common law, so that he could discern its nature and cause. And I should more than doubt, whether a complaint stating only, that some liquors were in one or all of several buildings mentioned, and were intended by some person to be sold, would be sufficient. Suppose it is all admitted, *non constat*, that the liquors seized are those referred to, or that their owner, or any person to whom he had intrusted the possession, had any unlawful intent. It may be so, but it also may not be so; and a criminal charge, not only according to the rules of common law, but from the nature of the thing, should at least contain enough to show, that if true, the appropriate punishment should be inflicted. Yet here, all that the complaint avers may be true, and yet the property of the plaintiff never held for sale in Providence, by him or his agent. It is to be borne in mind that this complaint is not merely the ground for issuing a warrant of search, and for the arrest and detention of the property, but it is the sole basis for judicial action afterwards. It is the only presentment of the offence; and, therefore, if the proceeding was to result only in a forfeiture of property, I should still consider the complaint as so deficient in the requisite certainty, as to be bad for that cause.

But it is not possible thus to separate the proceedings, under this act, against the property, from the proceedings against the person, on appeal. The court is to order the property to be destroyed, only in the event, "if the final decision shall be against the appellant." If there is no accusation, upon which the appellant can lawfully be tried, there can be no final decision against him, and the property cannot be destroyed.

When this writ of replevin was served, this property

was held under an order of forfeiture, which was invalid, for two reasons: First, because there was no sufficient complaint; and secondly, because the plaintiff was deprived of his property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions, which the legislature had no constitutional power to impose.

In general, a judicial act is not void, but voidable only; and, therefore, it is necessary to consider whether this order comes within that class of acts which are only voidable by some appropriate legal proceeding in the same case, or was absolutely void.

An order made by a justice of the peace, concerning a matter not within his jurisdiction, is void; and he, and all ministerial officers who execute that order, are trespassers. *Wise v. Withers*, 3 Cranch, 331; Cowp. 140; 7 B. & C. 536; 5 M. & S. 314; 11 Conn. 95; 7 Wend. 200.

Such an order confers no authority to detain property, and is not a defence to an action of replevin by its owner. The inquiry, therefore, is, whether the magistrate had jurisdiction to make this order; and I am of opinion that he had not.

It has already been stated that this is a criminal prosecution. So far as this law attempts to confer jurisdiction upon justices of the peace to inflict fine and forfeiture, a trial by jury being at the same time denied, unless the accused should comply with conditions to which he is not bound to submit, it is in conflict with the Constitution, and is wholly inoperative.

The legislature may confer on justices of the peace power to punish offences; but it must be so done as to preserve, unimpaired, the right of trial by jury; otherwise, the whole proceeding is void, *ab initio*. The Constitution declares, that, "in all criminal prosecutions, the accused

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shall enjoy the right to a speedy and public trial by an impartial jury." The act, now under consideration, provides that the right shall not be enjoyed in all criminal prosecutions; but, under this act, only in those cases in which security shall be given to pay all fines and costs.

It is not practicable to consider the grant of jurisdiction to the justice valid, and the condition imposed on the exercise of the right of appeal void; because an appeal, in a criminal case, can exist only by force of a statute; and if the statute has given it only on certain conditions, the magistrate must execute his judgment, and cannot allow the appeal; and the Appellate Court cannot entertain it, unless those conditions are complied with. In substance, it is a grant of final jurisdiction to a justice of the peace, in all cases in which such security is not given; and this is such a criminal jurisdiction as cannot be created under the Constitution of Rhode Island.

I am of opinion, also, that the complaint in this case was so defective, as to render all proceedings under it void. Here, also, the rule is, that if the process, though erroneous, is voidable only, it must be avoided by some proper legal proceedings; and while it stands, they who act under it are not trespassers. But this is not an authorized legal proceeding, in which an error has occurred. The complaint is in the form required by the act. The difficulty is, that the act has authorized a criminal prosecution, founded on a complaint which is not "due process of law." This act, so far as it authorizes such a prosecution, being in conflict with the Constitution, is inoperative, and it seems to be a necessary conclusion, that it confers no jurisdiction to receive and proceed upon such a complaint.

This may be illustrated, by supposing a law authorizing a criminal prosecution without any complaint. In such

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case, there could be no doubt that the whole proceeding would be absolutely void. I think it would be difficult to make a sound distinction between no complaint, and one which does not satisfy this requisition of the Constitution, which, therefore, is no legal complaint, and is not "due process of law," within the definition by Lord Coke, of the words "law of the land," in Magna Charta.

It has long been settled, *Martin v. Marshall*, Hob. 63, that the magistrate must not only have a jurisdiction of the subject-matter, but of the process. And if the law, conferring jurisdiction, is fatally defective, as respects the process, which is the foundation of the jurisdiction, the jurisdiction does not exist. *Grumond v. Raymond*, 1 Conn. R. 40.

For both these reasons, I am of opinion that the proceedings before the Court of Magistrates were inoperative to divest the owner of this property of his legal rights; and, consequently, neither the taking nor detention are justified by the avowry. .

Several other questions have been argued at the bar in this case; but I do not find it necessary to consider them. They involve important rights under the Constitution and laws of the State. If any case should come here for judgment, requiring their decision, I shall pass upon them. This case is determined without doing so.

My opinion is, that there should be a judgment for the plaintiff, upon the demurrer; and if he claims damages for the taking and detention, their amount must be assessed by a jury.

PITMAN, District Judge, said he fully concurred in the opinion of Mr. Justice Curtis, and added :

The law in question was, no doubt, intended, by many

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good men, to promote the welfare of the community ; but if this good cannot be accomplished, except by the sacrifice of those principles which are so essential to secure our rights and liberties, we cannot hope for security, because we are under a popular government. The despotism of *numbers* is quite as much to be dreaded as the despotism of *one*.

It is not lawful to do evil, that good may come ; and (if I may be here allowed to say so) it is not *expedient*. If good men disregard the vital principles of the Constitution, how can they expect that bad men are to be controlled by law.

There are other features of this law, which struck me, at the hearing, as a violation of the constitutional rights of the citizen.

The right of trial by jury, affected as it is by the conditions and obstructions which are annexed to the claim of this right by other sections, by the 9th section is rendered of less value to the accused, not only by declaring that no person engaged in the traffic of selling liquors, contrary to this act, "shall be competent to sit upon any jury in any case arising under this act," but by the mode of ascertaining the fact. The Constitution provides, that "no man, in a court of common law, shall be compelled to give evidence criminating himself." Art. 1, sect. 13.

This law authorizes the Court to inquire of the juror who may be challenged, on this account: it is true, the law says "he may decline to answer," but what then ? Is the fact to be proved by other evidence ? No ; his silence is considered as sufficient proof, and he is excluded accordingly. He is, therefore, compelled to answer, if he does not wish to be excluded, as unworthy to sit as a juror, or does not wish to be considered as concerned in a traffic which may be considered as infamous.

The maxim of the common law, recognized by the Constitution, is, that every man is to be presumed innocent, until he is proved to be guilty.

The whole spirit of this law appears to me, to be at variance with the rights of property, as well as person.

The legislature has no right, by an act, to confiscate the property of the citizen; it may be forfeited for a violation of law, but this must be done, without affecting the rights of the owner thereof to a jury trial. But the object of this law does not appear to be so much "for the suppression of drinking-houses and tippling-shops," as its title would seem to import, as for the destruction of intoxicating liquors—because they may be injurious to the community. But those who drafted the law, no doubt knew, that this could not be done, without making compensation to the owner thereof, as the Constitution of Rhode Island, and most of the other State Constitutions provide, that private property cannot be taken for public use, without just compensation. To evade this provision, it is made criminal to have this kind of property, not merely in "drinking-houses and tippling-shops," but "in any store, shop, warehouse, or other building," &c., (sect. 11,) with intent to sell the same; and by what manner of process, and how it is to be destroyed, we have seen,—evidently, with a view to evade the trial by jury. Such an evasion is as illegal as a denial of this right; and if such a law is to be justified, it can only be by adding another provision, by which the owner shall be compensated for the destruction of his property.

Lord Coke, in his commentary upon the 29th chapter of Magna Charta, says, (2 Inst. 48,) "5, No man destroyed," &c.

"Every oppression against law, by color of any usurped

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authority, is a kind of destruction, for, *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud*; and it is the worst oppression that is done by color of justice."

In page 51, he says:—

"Against this ancient and fundamental law, (referring to Magna Charta,) and in the face thereof, I find an act of Parliament made, (11 H. 7, cap. 3,) that as well justices of assize as justices of peace, (without any finding or presentment by the verdict of twelve men,) upon a bare information for the King, before them made, should have full power and authority, by their discretions, to hear and determine all offences, and contempts committed, or done, by any person or persons, against the form, ordinance, and effect of any statute made, and not repealed, &c. By color of which act shaking this fundamental law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson, Knight, and Edm. Dudley, being justices of peace throughout England; and upon this unjust and injurious act, (as commonly in like cases it falleth out,) a new office was erected, and they made masters of the King's forfeitures."

"But at the Parliament holden in the first year of H. 8, this act of 11 H. 7, is recited and made void and repealed, and the reason thereof is yielded, for that by force of the said act it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the King's subjects, to their great damage and wrongful vexation; and the ill-success hereof, and the fearful ends of these two oppressors should deter others from committing the like, and should admonish parliaments, that instead of this ordinary and precious trial *per*

legem terræ, they bring not in absolute and partial trials by discretion."

Judgment was then entered for the plaintiff, by order of Court, with one dollar damages, by agreement of parties.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MAINE DISTRICT, APRIL TERM, 1858.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. ASHUR WARE, District Judge.

THE BRIG ANN C. PRATT.

Under the 34th admiralty rule, the underwriter, who has accepted an abandonment, which divests the original claimant of all interest, may be admitted to intervene and become the *dominus litis*, in a suit *in rem*.

A bottomry bond, given for a larger sum than was advanced, for the purpose of deceiving the underwriter on the vessel, is void.

Such a bond cannot be allowed to stand as security for the sum actually advanced.

Bottomry is a peculiar contract, differing essentially from a loan with security, and is inconsistent with the existence of the lien implied by the marine law to secure advances to a master in a foreign port to make necessary repairs.

When the express contract of bottomry is void for fraud, no recovery can be had upon the footing of an implied contract and lien.

THIS was an appeal from a decree of the District Court

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in a cause of bottomry. The brig Ann C. Pratt sailed from Frankfort, in the State of Maine, Nov. 7, 1850, commanded and owned by Leonard B. Pratt, on a voyage to the Western Islands, and thence to such other port or ports as the master should determine to visit. She arrived at Terceira, on the 29th of November, having encountered severe gales, and been obliged to throw over a part of her deck-load. She sailed thence for St. Michael, and arrived in sight of that island on the 31st of December, but owing to gales of wind and thick squally weather, was unable to come to anchor until the 11th of January; and from that day she lay in an open roadstead until the 13th of January, when, the master being on shore with the ship's papers, she was struck by a heavy squall, parted her cables and all her other fasts, and was driven to sea with no anchor on board. Richard R. Airey, the mate, took the command, and determined to run for St. Thomas, whither the master had, before the disaster, concluded to go from St. Michael. The propriety of this determination was questioned by the claimant, and much of the evidence bears on this question. The brig arrived at St. Thomas on the 6th of February; a survey was called, and pretty extensive repairs were ordered by the surveyors. Money to make these repairs was advanced by the libellant, and a bottomry bond taken, signed by Airey. Other facts, necessary to the determination of the case, are stated in the opinion of the Court.

CURTIS, J. There is a preliminary question in this case, which must be first disposed of. On the return of the process, in the Court below, Leonard B. Pratt appeared and claimed the brig as sole owner. In that capacity, he was admitted by the Court, contested the action upon answer and proof, appealed from the decree, and entered

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his appeal in this Court. After the appeal had been claimed, an abandonment, which he had previously made of the brig to the company that had underwritten a policy of insurance on her, was accepted by the underwriters, who applied to the Court, by petition, on the fourth day of the term at which the appeal was entered, setting forth these facts, and praying for leave to intervene. The question is, whether, at this stage of the cause, this can be allowed. The thirty-fourth admiralty rule of the Supreme Court regulates the exercise of the right of intervention by third persons, in some cases, where that right exists, "according to the course of admiralty proceedings;" but it does not determine in what cases third persons are entitled thus to be heard. The forty-third rule does declare, as well as regulate, the exercise of the right of intervening, *pro interesse suo*; but it extends only to an interest in any proceeds in the registry, and has no application to a case where the third person seeks to come in as sole owner of the *res* and contest the suit.

In the absence of any direct authority, it would seem to be quite clear, that a Court of Admiralty, no more than a Court of Equity, would take notice of mere voluntary assignments of the subject in dispute, made *pendente lite* by the respondent. It cannot suffer its proceedings thus to be incumbered or affected. It is clear, also, that when there is a change of ownership, by operation of law, as in case of death, the same objection does not exist, and that it would be in conformity with its practice, to admit the representative to appear. By a rule of the Supreme Court, passed in 1821, such a case is specially provided for in that Court. It does not extend to the Circuit or District Courts, but is of importance, as showing the propriety of admitting a representative in an Appellate Court. It must be observed, however, that it is only as a representative,

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as having become clothed with the rights of the original claimant by succession, that the third person is admitted. Now, the case before me does not belong to either of these classes of cases. It is not an assignment by operation of law, nor is it a mere voluntary assignment *pendente lite*. The policy was underwritten, the disaster occurred, and the right of abandonment existed, in point of law, before the suit was begun. The inchoate right of the assured to recover, as for a constructive total loss, could only be perfected by making an abandonment; and when duly made and accepted, it relates back to the time of the disaster, and clothes the underwriter with all rights which at that time belonged to the owner.

I do not consider an abandonment, made to perfect the previously existing rights of the insured, as resting on the same ground as a voluntary assignment; nor that the legal operation of such a transfer should be treated by the admiralty as similar to a sale *pendente lite*. I can perceive no particular inconvenience in allowing the underwriter, who has accepted an abandonment, to intervene and be admitted a party to the suit, as having succeeded to the rights of the original claimant, and that, thereupon, the appeal would be heard, as in other cases.

But this is a case in which the underwriter claims to have succeeded to all the rights of the original claimant in the subject proceeded against, and that the latter is consequently completely divested of all interest, and should be, of all control over the suit, as in case of death or bankruptcy; and if admitted, he must be *dominus litis*.

The thirty-fourth rule seems well enough adapted to such cases. Unless this construction be put upon it, I perceive no provision even for the death of a party, after an appeal to this Court; and as this Court does not possess power to remit an admiralty cause to the District Court,

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and there is no rule expressly providing for a supplemental libel to be filed here, some rule to prevent the abatement of suits is needful; and I shall hold this thirty-fourth rule to be applicable to all such cases. The order which was entered at a former day, *de bene esse*, may, therefore, stand.

Having disposed of this preliminary question, I proceed to consider the merits of this case. There are some points in the case which are too clear to require me to pause upon them. That the mate succeeded to the command, in the emergency which occurred, there can be no doubt. The presumption is, that he was a person of competent skill and ability to discharge his duties; and if he was, and fairly exercised his judgment and discretion, all interested were bound by his acts. Upon these points, I perceive nothing in the evidence which would impeach his conduct. There is a difference of opinion among the experts; but it is far from satisfying my mind, that the respondents can avail themselves of the determination of the mate to carry the vessel to St. Thomas, as a defence to this bond. I deem it unnecessary to detail the evidence bearing on this part of the case.

It is equally clear, that the mate, as temporary master, had the power, in a fit case of necessity, to take up a loan on bottomry; and that the lender, in such a case, is not held to see to any thing more than an apparent necessity for the repairs. The authority of the mate, as temporary master, is essential to enable him to give such a bond. Like other agencies, he who seeks to acquire a right through a bond thus executed, must see to it that the person assuming to act as master, is rightfully master. But if he be master, it does not impose any new duty of diligence upon the lender, that he became such by reason of a casualty in the course of the voyage. When the owners

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appoint the mate, they are supposed to contemplate such casualties, and to agree that the mate shall exercise all the needful powers of master, in case they occur; and third persons may rightfully treat with him as master, when he has thus become such. *The Kennersley Castle*, and *The Rubicon*, 3 Hagg. 8, 9; *The Alexander*, 1 Dods. 280.

The real difficulty of the case begins when we have advanced beyond these questions, and reached the bond itself.

The amount actually lent by the libellants was \$3877.25. The bottomry bond was given in the sum of \$4591.42. Two sets of accounts and vouchers were made out, the one corresponding with the truth of the case, the other with the fictitious amount of the bottomry bond, and both sets were sent to the father of Captain Pratt, accompanied by letters of advice from the libellant and Airey, informing him that the bond was given for this larger sum, and the false account and vouchers sent, to enable the owner to make a claim therefor on the underwriters upon the vessel. A bill of exchange for the true sum was drawn by Airey, at the same time the bond was given.

The frankness with which this scheme is explained to the father of Captain Pratt, by a mercantile house apparently of good standing, may induce the belief that such practices are not infrequent; but if so, they are not therefore the less reprehensible, nor is it the less necessary that they should be looked at in their true light, and visited with their just consequences, when they appear in a court of justice. This is a fraudulent bond, and the Court will not lend its aid to enforce it. Even if the third person, on whom it was designed to impose, had sustained no confidential relation to either of the parties to this transaction, still the bond would be void. The *jus tertii* is entitled to protection from actual fraud; and the protection is given,

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by refusing relief to either party to the fraudulent arrangement, not on account of any merit of his opponent, but for the sake of public morals, and of the right of the party sought to be defrauded. This doctrine has been applied in numerous cases, even at the common law. Thus, a secret promise to pay to one creditor more than the composition paid to others for signing the deed, (*Leicester v. Rose*, 4 East, 372, *Wells v. Girling*, 1 Brod. & Bing. 447,) or to procure signatures to a petition for the discharge of an insolvent, (*Payne v. Eden*, 3 Caine R. 213, *Case v. Gerish*, 15 Pick. 49,) or to prevent fair competition at an auction sale, or a sale on execution, (*Doolen v. Ward*, 6 Johns. 194, *Gardiner v. Morse*, 25 Maine R. 140,) or a promise to give more for goods than the price a friend, who had been prevailed on to buy them for the defendant, had paid, (*Jackson v. Duchaire*, 3 T. R. 551, *Pidcock v. Bishop*, 3 B. & C. 605,)—are all void at law, though both parties before the court participated, and the fraud was directed against a third person.

But in this case, the underwriters had a relation to the vessel and to Airey at the time this bond was given. A disaster had occurred, calling for repairs. If their amount should prove to be sufficient to justify an abandonment, and it should be duly made, or made and accepted, it would relate back, by operation of law, to the time of the disaster; and from that time, Airey would be the agent of the underwriters. This has actually happened; and in the posture in which the case now stands before the court, Airey, when he gave this bond, acted for account of whom it might concern, and it has turned out to concern the underwriters.

I have no hesitation in pronouncing the bond to be void for fraud.

Nor can the bond be suffered to stand as security, even

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for the sum actually advanced. I adopt the language of Kent, J., in *Sands v. Codwise*, 4 Johns. R. 598, as expressing the true rule:—"I presume there is no instance to be met with of any reimbursement or indemnity afforded by a Court of Chancery to a *particeps criminis* in a case of positive fraud. In *Smith v. Loader*, Prec. in Ch. 80, the party advancing money to an agent, under a combination with him to cheat the principal, lost his whole security from the principal for the money actually advanced to his agent. It is fit and proper this result should take place, as a contrary course might afford countenance to fraud, by giving it a partial effect." This is the settled rule in Courts of Chancery. *Bates v. Graves*, 2 Ves. Jr. 294; *Attorney-General v. Vigor*, 8 Ves. 283; *Boyd v. Dunlop*, 1 Johns. Ch. 482. And it is as fit and applicable in a Court of Admiralty, which administers equity in maritime affairs.

One other question remains. Can the libellant be allowed to sustain the suit, upon the footing of a lien upon the vessel, under the general maritime law of Europe and America, for the sum actually advanced by him for repairs and supplies?

The original libel is in a cause of bottomry, and propounds the bottomry bond, and seeks to recover upon it the whole principal sum, together with the marine interest, at the rate of ten per cent., stipulated for in the bond. The answer contested the validity of the bond, as being fraudulent. By an amendment, allowed to be filed at the hearing in the District Court, an article was introduced, propounding a claim for the true amount advanced, together with the maritime interest; and upon this article, the court below declared that a lien existed in favor of the libellant, by operation of the general admiralty law, and decreed accordingly. The claimant appealed.

That such a lien would have attached upon this vessel,

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by operation of law, if no bottomry contract had been made, is clear. But two very grave questions arise, Whether the contract for a bottomry loan, followed by the execution of the bottomry bond, and the institution of a suit to enforce it, are consistent with the existence of that lien, by operation of law; and whether the bond, being pronounced to be fraudulent, the court will aid the lender to recover what, independent of the fraud, would justly have belonged to him?

In considering the first of these questions, I must take it to be true, that the lien created by the maritime law may be, and is, waived by the creditor, by any act or contract which is inconsistent with an intention to receive or retain that lien. The cases of *The Nestor*, 1 Sumner, 73, and *The Chusan*, 2 Story, 455, were discussed and decided upon an admission of the correctness of this position, which is supported by *Ramsey v. Allegre*, 12 Wheat. 611, and *The William Money*, 2 Hagg. 136. The inquiry is, whether what was actually done in this case is consistent with an intention to obtain or hold the lien, which the law maritime creates in favor of the lender of money to the master, for making necessary repairs in a foreign port?

The original libel states that the master, being in want of money, and having no other adequate means of procuring the same, borrowed of the libellant the sum of \$4,591.42, upon the bottomry and hypothecation of the said brig, her tackle and apparel, and said sum was accordingly advanced and paid by the libellant, at the rate of ten per cent. premium for the maritime risk, and that in fulfilment of the agreement of bottomry, the master executed the bond. Airey testified that he made an agreement with the libellant, not in writing, to furnish funds to repair the brig, and to give him a bottomry bond on the vessel, to secure the payment of what he might advance.

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"He was not willing to furnish the funds, unless I would do as we talked." So that, in point of fact, the libellant was unwilling to deal upon any other footing than that of a contract of bottomry; and both parties, from the beginning, contracted solely with reference to such a bond. Now, this is a contract of a peculiar character, distinguishable, by very marked characteristics, from an ordinary loan. Pothier, *Contrat à la Grosse*, n. 6, says, "It differs from all other contracts; it forms a particular species by itself." Boulay-Paty, in his notes to Emerigon on Bottomry, (vol. 2, p. 417, ch. 1, § 2,) uses the following emphatic language: "It is neither a sale nor a partnership, nor a loan, properly speaking, nor insurance, nor a compound of different contracts, *undique collatis membris*,—but it is a contract having a specific name,—*un contrat nominé*,—and a character peculiar to itself." And Emerigon, in the text, (ch. 1, § 4,) has an elaborate dissertation on "the difference between the contract of bottomry, of loan, of partnership, and insurance; and he points out five distinct particulars in which a contract of this kind differs from a loan, the most important of which are, the risk taken by the lender, and the premium paid for that risk. To a certain extent, the same view of this contract is taken in the case of *The Atlas*, 2 Hagg. 51.

Indeed, so important is the difference between the contract of bottomry and a simple loan, that it has generally been deemed essential that it should be contracted for at the outset, and before the advances were made, (as it was in this case,) to support a bond when actually given. *The Virgin*, 8 Pet. 538; *The Augusta*, 1 Dods. 283; *The Hebe*, 2 Wm. Rob. 146; *The Wave*, 4 Eng. Law and Eq. Rep. 589.

This being so, it seems to me impossible to maintain that the parties intended that a lien, by operation of law,

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should exist, for the security of a simple loan, to make repairs, in this case.

One method of determining whether both the implied lien and the express hypothecation, by way of bottomry, can be intended to exist together, is to consider that the first has for its object to secure the repayment of a loan of money, which is absolutely to be repaid, either upon demand, or at a stipulated time, and for which the master may pledge the security of the vessel, the owners, and himself; while a loan on bottomry does not oblige the owner personally, is to be repaid only on condition of surviving the perils, the risk of which the lender assumes; and constitutes, as the writers on maritime law have so emphatically declared, an obligation of a distinct and peculiar kind. It is true, that in both cases liens exist; but the one is implied by law, the other is created by the act of the master; the one is security for a *debt* of the owners and the master, the other is a right to receive a sum of money out of the thing at risk, in case it should survive the perils, the hazard of which is assumed by the lender; the one is merely a collateral security for a simple loan; the other is a transaction standing quite by itself, not capable of being analyzed into a loan and a mortgage to secure it, and a contract of insurance, and another of partnership, *undique collatis membris*, but simply a contract of bottomry, unlike all of them, and resembling nothing, and being consistent with nothing, but itself.

There is one analogy derived from Courts of Chancery, which is entitled to some consideration. It is the case of a purchaser, who has taken a mortgage on the estate sold, to secure the purchase-money. It will be seen at once how far short of the case now before me this is; for there, both the equitable lien implied by law, and the security created by act of parties, operate to secure one and the

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same contract to pay the purchase-money. Yet it has been, and still is, the subject of grave doubt, whether the implied lien can stand with a mortgage. *Fish v. Howland*, 1 Paige, Ch. R. 20; *Little v. Brown*, 2 Leigh, 353; *Boos v. Ewing*, 17 Ohio, 500; *Manly v. Slason*, 21 Vt. R. 275; Metcalf's Yelv. 66, n. And it is settled, that any act of the parties, showing an intention not to rely on the implied lien, prevents its operation. *Brown v. Gilman*, 4 Wheat. 255. Having entered into a contract, in its nature and incidents wholly distinct from a simple loan, secured by a lien implied by law, the maxim, *expressum facit cessare tacitum*, applies. In my judgment, 'he who loans money on bottomry, makes a contract, which is to be followed out through all its remedies, as such; and when it proves to be voidable for fraud, and is avoided, he cannot treat it as a simple loan, secured by a maritime lien, and thus charge it on the property which he failed to obtain a right to, by the only contract which was made. In accordance with this, is the eighteenth Rule of Practice in the Admiralty, prescribed by the Supreme Court. "In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only, against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct, has avoided the same, or has subtracted the property, &c., in which latter cases the suit may be *in personam* against the wrongdoer." I apprehend that this points to the only remedy which the lender has, when the bond is void for the fraud of the master, and the lender has not participated in that fraud. If he has participated, it is at least questionable, whether the court would exert itself actively, to give him a remedy for his actual advances, even if a maritime lien was implied by law. If the bond itself, which

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created an express lien, cannot be allowed to stand as security for the money advanced, can he, by changing merely the form of his remedy, recover on a lien implied by law?

I know of no precedent for this; and analogous cases may be found, which are inconsistent with it. Thus, if a policy of insurance be void for fraud of the insured, the law will not allow the premium to be recovered back, though, in the absence of fraud, it implies a promise to repay it. *Schwartz v. U. S. Ins. Co.*, 3 Wash. C. C. 170; *Feise v. Parkinson*, 4 Taunt. 639; *Tyler v. Home*, and *Chapman v. Frazer*, Marshall on Ins. 661; *Waters v. Allen*, 5 Hill, 421. In point of principle, I am of opinion, that the fraud is an answer to the substance of the claim, for a restoration of the money advanced, and that it is not material through what forms of remedy the recovery is sought.

But it is not necessary to go to this extent in this case. It is enough, that the bond, being fraudulent, cannot be enforced: and that, in point of fact, no such loan, as raises an implied lien, was made.

The result is, that the libel must be dismissed, with costs.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MASSACHUSETTS DISTRICT, MAY TERM, 1853.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. PELEG SPRAGUE, District Judge.

RICHARD HENNESSEY *et al. vs.* THE SHIP VERSAILLES
AND CARGO.

What constitutes a salvage service.

What is necessary to displace the ordinary principles of adjudication, touching
such service.

The elements upon which the amount of compensation depends.

THE case is stated in the opinion of the Court.

CURTIS, J. On the night preceding the first day of
March, the ship Versailles, having on board a very valua-
ble cargo, and a crew of eighteen, officers and men, bound
to Boston, in approaching that port, struck on a sunken

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ledge of rocks called the Collamores, near the shore of Cohasset, was forced over the reef, and brought to anchor. The wind was then about north-east; and with both anchors out, and the yards braced back with the larboard braces, the ship lay broadside to some rocks, which were about fifty feet off, on her larboard beam. The pumps were immediately sounded, and two feet of water found; and from midnight to seven, A. M., the water gained on the pumps, which were kept constantly going, from four to five inches an hour. At seven, A. M., the master and eight men, in the long-boat, landed on the Cohasset shore, taking with them the wife, child, and a maid-servant of the master, and the ship's chronometer. The master's wife was sent immediately to Boston, by railroad, taking a message to the owners of the ship in Boston, that the vessel had been ashore, was leaking, and if they would send a steamboat, it would be all right.

The long-boat and crew returned to the ship, leaving the master on shore, to procure assistance; and at a signal from him, came back, bringing the clothes of a part of the crew, and took him off. Subsequently, the clothes of the residue of the crew, and one man, who was disabled, were brought ashore, and there left.

About eight, A. M., men from the shore came to the assistance of the crew, and continued to arrive from time to time, so that, at about nine, A. M., they were twenty-eight in number. When the first party arrived, the vessel had from seven to nine feet of water in her hold; and these additional men, with the crew, were able to keep the water from increasing, but not to reduce it. In this condition, the ship remained until about two, P. M., when the steamer *Rescue* came in sight, approached near enough to take a hawser on board, and after failing in the first attempt, in consequence of one of the ship's chains get-

ting foul when shipped, the steamer took the ship in tow, and brought her to a wharf in Boston.

These facts are not contradicted; but the principal question made at the hearing was, whether the steamer was entitled to be compensated, as for a salvage service, according to the principles which regulate that compensation in a Court of Admiralty.

The relief of property, from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage; and when its compensation is not fixed by such a contract as a Court of Admiralty will enforce, it is to be adjusted according to those liberal rules which have been found beneficial to commerce, and have long formed a part of the marine law.

The inquiries, therefore, are, whether a peril of the sea was impending over this property; whether it was relieved therefrom by the steamer; and whether such a contract existed, as either deprives the libellants of the character of salvors, or fixes the measure of their compensation.

Upon the first of these questions, I entertain no doubt.

An examination of this ship, upon the railway, after her arrival, showed that when she was forced over the reef, about thirty feet of her keel, from the stem, aft, was entirely destroyed; two floor timbers, four or five naval timbers, and about twenty futtock timbers, were broken; her plank upon those timbers was stove in, and the ceiling started inboard. She had from seven to nine feet of water in her hold; and upwards of forty men, including her crew and the men from the shore, had then been able only to keep the leak in check, without reducing the water in her hold. She was at anchor within fifty feet of a ledge of rocks, upon her larboard beam, from which she was kept

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by her sails, in the then state of the wind, which would not serve for that purpose if it should haul to the eastward, an event certainly not improbable in the month of March, on that shore. Besides the ledge of rocks on which she had struck, there were others in the immediate neighborhood. Without coming to any conclusion here, as to her precise degree of peril, where she lay, or the chance of her escape unassisted, both which must be considered hereafter, it is enough to say, that a peril of the sea, in the sense of the marine law, was impending over her; that she was in a condition to need assistance, and capable of having a salvage service rendered to her. In estimating the amount of compensation to be allowed, the degree of peril from which the property has been delivered, is most material. To determine the nature of the service, so far as it depends upon this element of sea peril, it is only necessary to find that some extraordinary peril, something beyond the ordinary action of winds or waves; some unusually hazardous condition of the vessel, existed. And in this case, this element is too marked, to admit of the least doubt.

Nor is any question made, that in point of fact, the ship was withdrawn from her dangerous predicament, and restored to ultimate safety, by the assistance of the steamer. But it is insisted, that the service of the steamer was rendered upon a contract, which deprives the libellants of the character of salvors, and reduces their claim to a *quantum meruit* for work and labor; that what was done was merely a towage service, and not a salvage service.

I do not think there is such a thing as a towage service, known as such to the marine law, as contradistinguished from a salvage service.

Towage, like pumping or steering, making sail, or any other ship-work, may occur in the ordinary course of navi-

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gation, or may be a means of salvage. And whether it is to be paid for according to a *quantum meruit*, or at an agreed price, or by way of wages, or by a salvage compensation, must depend upon the circumstances under which it is performed.

In this case, the Versailles being in distress, and in a condition to have a salvage service rendered to her, and having been relieved by towage, that towage was, in its nature and circumstances, a salvage service, unless it appears that there was some relation existing, by contract, between the managers of the steamer and the ship, inconsistent with their sustaining the character of salvors.

It is incumbent on those who assert that such a relation existed, and who call on the Court to apply, to what is *prima facie* a case of salvage, some other than the ordinary principles of adjudication which govern such cases, to plead the contract, and exhibit satisfactory proof in support of it.

So that what I have to determine is, whether a contract is pleaded and proved, which establishes such a relation between the asserted salvors and the ship, as deprives them of the character of salvors, by showing that the service was rendered in some other capacity; or if rendered in the capacity of salvors, that the agreement displaces the ordinary principles of adjudication, and introduces a measure of compensation derived from compact.

I must first look to the pleadings; and I do not find it asserted in the answer of either the claimants of the ship or the cargo, that such a contract existed.

The only allegation bearing on these questions, in the answer of the claimants of the ship, are in the eighth article of their answer, which is as follows: "These respondents allege and propound, that the services rendered by said steamboat were not, as in the eighth article of the

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said libel is alleged and pleaded, salvage services, but were mere towing services." The eighth article of the libel, to which this is an answer, is merely the assertion of the title of the libellants to a salvage compensation, by reason of the nature of their services described in their previous articles; it is no more than a statement of a legal result or inference, from the facts previously pleaded; and the answer to that article can scarcely be carried further than a traverse of it, founded, as the article itself was, on a previous statement of facts concerning the nature of the services. Certainly it cannot be treated as pleading a contract, sufficient to deprive the libellants of the character of salvors, or to require the Court to conform to an agreed measure of compensation different from that awarded by the law. To produce either of these effects, the particular contract should have been pleaded, to the end that the Court might see whether the circumstances under which it was made, its consideration, and the services actually performed, compared with those stipulated for, were such as would induce the Court to decree its execution. And, especially, if it was relied on as a bar to a salvage compensation, it should have been pleaded, distinctly, as such a bar.

I should have regretted, however, to have had the case turn upon this state of the pleadings; and on examining the evidence, I do not find such proofs as would have supported the necessary allegations, in bar of a libel in a cause of salvage.

The evidence relied on by the claimants comes from the deposition of Mr. Caleb Curtis, the President of the Neptune Insurance Company, who, I infer, interposed in this matter, upon the reception in Boston of the news of the condition of the Versailles, in consequence of that company having an interest as insurers of the cargo to a small

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amount. It appears that about the same time the condition of the Versailles became known in Boston, it was also ascertained that two other vessels, bound to that port, were on shore a little to the eastward of the place where the Versailles was at anchor; and Mr. Curtis proves that Captain Hennessey, the master of the steamer Rescue, was sent for to come to the reading-room in State street, and was there told what was known of the condition of each of these vessels. Soon afterwards, Mr. Curtis and Captain Hennessey again met at the office of the Neptune Insurance Company, when Mr. Curtis told the Captain they had not such news as to give any specific directions, but to go down, and if there was time before high-water, he might go to the assistance of the ships on shore, if the Versailles was not leaking too badly; but, at all events, to take the Versailles in tow, and bring her up before night. The Rescue was then lying at her wharf in East Boston, and soon after started, went directly to the Versailles, and took her in tow, as has been stated.

It is manifest that here was no express contract, inconsistent with a technical salvage service. The steamer went on this expedition at the suggestion, and, though not stated, it is fairly to be inferred, upon the request of the witness. In some sensé, this may be said to amount to an employment of the steamer; but so does any request for assistance. When the master of a vessel sets a signal of distress, it amounts to a request for assistance; and when it is tendered and accepted, there is an employment. But the question always remains, what service is rendered, and how is it to be compensated; and in the absence of a binding contract, the marine law settles that question, according to the nature of the service.

It is argued, however, that in this case, though there was no express contract to that effect, the Court ought to

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infer there was a contract to pay a *quantum meruit* for work and labor at all events, though the Versailles had been totally lost. If there was such a contract, fairly made, I do not think salvage could be claimed. But I do not find the grounds necessary for such an implication. In the absence of an express contract, the law implies that services are to be paid for, as such services are usually paid for. In the case of work and labor on land, only the fact of its performance, at the request of the defendant, is necessary to be shown, because such service is usually, reasonably paid for at all events. In the case of mariner's wages, the performance of some voyage, in which freight might have been earned, must appear, in addition to those other facts, because upon this event depends the title to wages; and so in the case of salvage, upon the ultimate safety of some of the property, as well as upon the other facts of service and request, depends the title to salvage; and consequently, the law will not imply that work and labor in salvage is to be paid for, except upon that contingency.

Now, it does not appear, either that such services generally, or when performed by this particular steamer, were usually paid for, at all events, by a *quantum meruit*. As to the general practice, there is no evidence that the law is otherwise. And as to this particular steamer, though it appears her occupation is to tow vessels, it is not shown that it is part of her occupation to go to the relief of vessels situated as the Versailles was; and if I could infer this from the evidence, there is absolutely no evidence that her owners, officers, and crew, were usually or ever paid for such services at all events, and by a reasonable sum, for mere work and labor.

The case, therefore, stands upon a request to the master of the steamer to go to the assistance of the ship, a compliance with that request, and the performance of a service,

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in its nature and incidents, salvage; and such a service must be rewarded under the conditions, and according to the measure of the marine law.

It has been suggested, that it is of great practical importance to the commerce of the port, that the Court should not come to a conclusion which would prevent those interested in vessels of distress from sending steam-tugs to their assistance, without subjecting themselves to the payment of salvage. I do not conceive that the principles above laid down have any such tendency. It is competent for those parties to make any fair and reasonable contracts on these subjects, and this Court will enforce them. But they must take care actually to make contracts, and not leave them to be inferred from facts, which in point of law, will not justify such inferences.

The remaining inquiry is, what compensation ought to be paid to the steamer. The principles upon which it is to be assessed are well settled, though their satisfactory application is often difficult.

The value of the property saved, the degree of peril from which it was delivered, the risk of the property, and especially of the persons of the salvors; the severity and duration of their labor, the promptness of their interposition, and the skill exhibited by them, are all to be considered.

In this case, the value of the property saved was large, about one hundred and twenty thousand dollars. The remuneration is of course to be greater on this account, not only because a greater benefit was received, but also because it enables the Court to confer such a reward as to operate as an encouragement to salvors, without casting a heavy burden upon an amount of property too small to be adequate to bear it.

In my opinion, the degree of peril, from which the ship

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and cargo were delivered, was very considerable. Without undertaking to say, that, with assistance from the shore, the ship could not have been worked by her sails clear of the rocks, and brought into the harbor, it is clear that the attempt would have been attended with much risk, even with the wind and the bearings of the rocks as the witnesses for the claimants give them. Nothing can show this more clearly, than the fact, that the master did not make the attempt, but continued to lie at anchor there five hours after the men from the shore came on board, although he must have known, that at that season of the year, the wind was liable to change at any moment, so as to render his unaided escape impossible. In point of fact, the wind did so change; the witnesses do not agree on the precise point of time when; but whether it was just before or just after the ship was taken in tow, does not seem to me very material, unless it appears, that the master would have made the attempt to get out before the wind changed, if the steamer had not arrived; and he does not so testify, nor had he then begun to make his preparations for the difficult evolution he describes, by which he says he should have tried to get under way, headed to the eastward, without coming in contact with the rocks on the larboard beam.

On the other hand, I am not satisfied, by the evidence, that the peril to the steamer was materially greater than what is ordinarily incurred in navigating, for a short distance, in the neighborhood of ledges of rocks, in a narrow channel. If any accident should occur to the machinery, the danger would, no doubt, be great. But this steamer is said to have been built and employed as a tow-boat, and, it is reasonable to infer, had strength suitable to that business. There does not appear to have been any such unusual strain put upon her, as ordinarily would, or in fact

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did, injure her machinery. It is not proved that she was worked under an unusual head of steam. There was not, therefore, such a reasonable probability of injury to the machinery, as ought to form any considerable element in the computation of the reward.

The labor of the men was no more than ordinary; and the length of time employed was about half a day. The sea was certainly not smooth; but it was not so bad as to cause the ship and steamer to labor much, and thereby much increase the difficulty of towing. After getting out from among the rocks, the ship used her sails; and though the water in her must have rendered her somewhat crank, it does not appear that, viewed simply as a towage service, it was one of great effort.

The fact that the vessel employed was a steamer, is undoubtedly to be taken into consideration; for sound policy requires, that they who are able to render the most efficient aid, by means of expensive boats, should be encouraged to do so. Speaking in general terms, it may be said, that an important benefit was conferred upon the claimants, by saving a large amount of their property, exposed to very considerable peril, through the prompt assistance of this steamer; rendered, however, with but small risk or labor, or loss of time. In such cases, the allowance of a specific proportion of the property saved has not been, of late years, much practiced in England, or, so far as cases are reported, in this country. A more exact appreciation of the merits of salvage services, and a nicer graduation of their rewards, have been attempted. This opens a large and difficult field of judgment and discretion, in which great caution is necessary; for it must not be forgotten, either that the security of life and property in navigation, and the general interests of commerce, require rewards for salvage beyond the usual rates of com-

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pensation for the exact work done, or that individuals must not be oppressively burdened for this public benefit.

After considering all the circumstances, I am of opinion that the sum of three thousand six hundred dollars is the proper sum to be allowed. If the claimants do not agree upon the apportionment of this sum upon the several interests at risk, I shall refer it to an assessor, to report thereon.

The libellants may agree on the distribution of the salvage compensation; but I shall require the agreement to be reported to, and sanctioned by the Court, for the protection of the crew.

UNITED STATES *vs.* MARK W. FOYE.

Evidence that the prisoner uttered as genuine, what purported on its face to be a bank-note, is competent proof that it was a bank-note, though it is not otherwise shown such a bank existed.

A letter, containing money, deposited in the mail, for the purpose of ascertaining whether its contents were stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by post within the meaning of the Post-Office Act. (4 Stat. at Large, 102.)

The description of the termini, between which the letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid.

It is necessary, in an indictment for larceny from a letter, under the 21st section of the act, to lay the property stolen on some person other than the prisoner.

THE case is stated in the opinion of the Court.

CURTIS, J. The prisoner, being a mail carrier, was indicted for stealing a bank-note from a letter deposited in

the mail of the United States, and intended to be conveyed by post.

Having been found guilty by the jury, he has moved for a new trial, and in arrest of judgment.

The first cause assigned for a new trial, is, that the defendant, not having been sworn, was not liable to be convicted as a mail carrier, under the 21st section of the act of March 3, 1825, (4 Stat. at Large, 102.)

This cause is not sufficient. The third section of the act expressly subjects persons employed in the conveyance of the mails to all pains, penalties, and forfeitures, for violating the injunctions of this act, though not sworn. The 21st section, by inflicting a penalty on the act charged in the indictment, must be considered as enjoining mail carriers not to commit that act; and consequently, if they do it, they are subject to the penalty provided in the 21st section.

The second ground of the motion is, that the jury were erroneously instructed concerning certain evidence. The indictment charges that the letter contained "a certain bank-note, of the denomination of five dollars, purporting to be issued by the Casco Bank of Portland, in the State of Maine; the said bank-note being an article and evidence of value, viz.: of the value of five dollars." Evidence was offered by the government, tending to prove that the person who inclosed the note in the letter, received the bill as of the value of five dollars; that the defendant, after taking it from the letter, paid it to a creditor, in discharge of a debt of five dollars; and a broker, who was much accustomed to receive bills purporting to be issued by the Casco Bank, having examined this bill, testified that it was like the bills he was accustomed to receive and pay. The jury were instructed that, if they believed this evi-

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dence, it was competent for them to find this note was a bank-note of the value of five dollars.

In this instruction, we think there was no error. The act of the defendant, in passing this note in payment of a debt of five dollars, was equivalent to an affirmance by him, that it was what it purported to be. It is a familiar rule, that the indorser of negotiable paper is estopped to deny the genuineness of all signatures which precede his own. And though this rule is not applicable to paper passing by delivery only, and the defendant was not estopped, as against the United States, from showing this was not a bank-note, yet we have no doubt his uttering it as genuine was evidence to go to the jury to prove it to be a bank-note, and of the value of five dollars; and if so, it would warrant, in point of law, in the absence of all other evidence, a finding to that effect.

The next cause assigned is, that the particular letter proved did not support the allegation in the indictment, which charges that one J. Pike Stickney deposited in the post-office at Georgetown a letter, addressed to John Blake, Ipswich, "which was intended to be conveyed by post, and was then and there mailed, to be conveyed in the mail of the United States, to the town of Ipswich aforesaid."

The evidence showed that Stickney was the postmaster at Georgetown; that in consequence of the loss of money from the mail on that route, he agreed with the postmaster at Newburyport to deposit in the mail a letter, containing money, addressed to John Blake, Ipswich; if the letter should arrive safely at Newburyport, it was not to be sent on to Ipswich, but was to be returned to Stickney. In pursuance of this arrangement, this letter and money were sent, arrived safely at Newburyport, and were returned to

Stickney, who, the next day, remailed the same letter, and the bag containing it was committed to the prisoner, who was the mail carrier between Georgetown and Newburyport. The letter was mailed precisely like other letters; that is to say, a bill was made out, containing the usual entries; this bill and the letter were inclosed in a wrapper, and the packet addressed to Ipswich, and deposited in the mail-bag, with other packets.

The first objection is, that this was not a letter intended to be conveyed by post, within the meaning of the act, and of the indictment. And the prisoner's counsel relies chiefly on the decision of the judges on a question reserved, in the case of *The Queen v. Rathbone*, 1 C. & M. 220.

But we consider that case distinguishable from this. By 1 Vic. ch. 36, § 47, it is enacted, that "post letter shall mean any letter or packet, transmitted by the post, under the authority of the Postmaster-General." The prisoner was indicted for stealing a post-letter. It appeared that an inspector placed the letter which was stolen, among some other letters, which the prisoner, who was employed in the post-office, was to sort, and inclosed in it a sovereign, to try the prisoner's honesty, which was suspected. This letter the prisoner stole; and it was held not to be a post letter, within the meaning of the act; for though, in fact, the letter was in the post-office, it had not come there in the course of business, and so was not transmitted by post, under the authority of the Postmaster-General.

In the case at bar, the only material difference between the letter stolen, and any others in the same bag, was, that it was not intended to be sent to its address. But it was intended to be conveyed by post from Georgetown to Newburyport, and was regularly mailed for that purpose. We do not think the purpose of the writer, not to have the

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letter go to its apparent destination, affects its character, or prevents it from being a letter intended to be transmitted by post, or takes it out of the protection of the statute.

But a far more difficult question arises under the other part of the objection. The indictment alleges, not only that this letter was intended to be conveyed by post, but describes where it was to be conveyed; it fixes the termini as Georgetown and Ipswich. The allegation is, in substance, that the letter was intended to be conveyed by post from Georgetown to Ipswich. The question is, whether the words, from Georgetown to Ipswich, can be treated as surplusage. It was necessary to allege, that the letter was intended to be conveyed by post. The words, from Georgetown to Ipswich, are descriptive of this intent. They describe, more particularly, that intent which it was necessary to allege. In *United States v. Howard*, 3 Sumner, 15, Mr. Justice Story lays down the following rule, which we consider to be correct: "No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage." Apply that rule to this case. It is legally essential to the charge to allege some intent to have the letter conveyed somewhere by post. Suppose the indictment had alleged an intent to have it conveyed between two places where no post-office existed, and over a route where no post-road was established by law. Inasmuch as the Court must take notice of the laws establishing post-offices and post-roads, the indictment would then have been bad; because this necessary allegation would, on its face, have been false. Words, therefore, which describe the termini and the route, and thus show what in particular was in-

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tended, do identify the intent, and show it be such an intent as was capable, in point of law, of existing.

And we are obliged to conclude that they cannot be treated as surplusage, and must be proved, substantially, as laid. We are of opinion, therefore, that there was a variance between the indictment and the proof; and that, for this cause, a new trial should be granted.

UNITED STATES vs. BENJAMIN RENDELL.

Under the 30th section of the Collection Act of 1799, (4 Stat. at Large, 649,) if the master make report of arrival, he is not liable to the penalty, though he do not repair to the office of the principal officer of Customs for that purpose.

THIS was a writ of error to the District Court of the United States for the District of Massachusetts, bringing up the record of an information filed by the District-Attorney against Rendell, as master of the American brig Nithroy, for not making report, within twenty-four hours, of the arrival of the brig at the harbor of Holmes's Hole, in the District of Massachusetts, from a foreign voyage, pursuant to the Act of March 2, 1799. At the trial of the information in the District Court, there was a verdict of not guilty; and the following bill of exceptions was taken by the District-Attorney.

"At the trial of this cause before the jury, the United States, by George Lunt, their attorney, claimed that the defendant was liable to forfeit and pay the sum of one thousand dollars, penalty, for neglecting and omitting to

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comply with the provisions of the thirtieth section of the statute of the United States, approved March 2d, 1799, entitled, 'An Act to regulate the collection of duties on imports and tonnage;' which section provides, 'that, within twenty-four hours after the arrival of any ship or vessel from any foreign port or place, at any port of the United States established by law, at which an officer of the customs resides, or within any harbor, inlet, or creek thereof, if the hours of business at the office of the chief officer of customs at such port will permit, or as soon thereafter as the said hours will permit, the master, or other person having the charge or command of such ship or vessel, shall repair to the said office, and shall make report to the chief officer of the arrival of the said ship or vessel.'

"The defendant was master of a certain vessel called the brig 'Nithroy,' which arrived from a foreign voyage into the harbor of Holmes's Hole, in the Collection District of Edgartown, at or about 9 o'clock, P. M., on the 14th day of February, in the year 1851. From this harbor she departed towards her port of final destination in the evening of the 17th day of the same month. At this harbor of Holmes's Hole, there resided one Henry P. Worth, who was, and had been for a long time, the Deputy of the Collector of Edgartown, and an Inspector of the Customs, by him appointed. He was the only officer of the Customs there resident, and had no clerk, and acted himself also as boarding-officer, under the provisions of the 25th section of the same act. He had an office in one of the chambers of his dwelling-house, but no person was there to act for him when absent. Over the principal door of his house was the sign, 'Custom-House;,' and there was evidence offered by the government, tending to prove that upon the outside of the door of the office within, was

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posted a written notice of business hours, viz: "Office-hours from 9 A. M. to 12 M., and from 2 P. M. to 4 P. M.;" and that he had such hours. There was evidence on the other side, tending to prove that he had no such hours.

"Evidence was given to show that, at this harbor of Holmes's Hole, many vessels, perhaps three thousand sail in the course of each year, were boarded by Mr. Worth; that five hundred of them at least would be under a foreign register; that he was absent from his office a great, and perhaps the principal, part of the time, in discharge of his duties as boarding-officer; but that he was always there when he had reason to expect that any business was to be done.

"During the period while the 'Nithroy' lay at Holmes's Hole, so far as known to the officer, neither the defendant, or any other person having charge or command of the vessel, made the report required by the act, at the office before described.

"The defendant, to maintain the issue on his part, gave evidence that Mr. Worth went on board the 'Nithroy,' upon her arrival; was there informed by the master of the place whence she came, and of the time of her arrival, and that he also received a copy of the manifest, and made a certificate on the original; and it appeared, that for more than thirty years last past, not more than one in thirty had ever made, or been required to make, any other report of arrival. Evidence, also, was given, tending to prove that it was the custom and practice of Mr. Worth to board all vessels immediately upon their arrival at that port under a foreign register, and to receive the report of their arrival on board, and sometimes he informed masters that he required no other report, unless they remained there over forty-eight hours.

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" Upon the exhibition of this evidence, the United States contended that the penalty provided by the statute was incurred by the defendant.

" But the judge instructed the jury, that, if the officer of the Customs actually transacts the business of receiving the report of arrival at any place within his district, such place must be considered as adopted by him, and that he has discontinued or changed for the time any other office which he may heretofore have had ; so that he either has no office to which the master can then repair and make the report, or that his office for that purpose is at the place where he actually transacts the business, by personally receiving the report ; and especially must this be so, when that is the place where the officer has been in the practice of transacting that business for at least thirty years ;" and that the report which was actually made, accomplished all the purposes of the law, and a further report merely of the arrival would have been utterly useless.

" Whereupon the United States, by their attorney as aforesaid, excepted to these instructions of the judge, and asked that their exceptions might be allowed ; and they are allowed accordingly.

" P. SPRAGUE, *Judge*.

" A true copy of record.

" Attest, S. E. SPRAGUE, *Clerk*.

" A true copy of the bill of exceptions.

" Attest, H. W. FULLER,

" *Clerk of the Circuit Court U. S. Mass. Dis.*"

CURTIS, J. It is not denied that in this case a report of the arrival of the vessel was made by the master, to the only officer of Customs resident at the place of arrival, or that this report was made within the prescribed time, and

contained all the required particulars. The objection is, that it was not made at the right place; that the act imperatively requires the report to be made, at the office of the principal officer of the Customs; and that the penalty is to be inflicted upon the master, if it be made elsewhere.

The act undoubtedly directs the master to repair to the office of the chief officer of the Customs, as well as to make report; but it does not necessarily follow, that it inflicts a penalty upon the omission to repair thither.

The penal clause applicable to this case, is as follows: "And if the master, or the person having the command of such vessel, shall neglect or omit to make the said report, *or shall not fully comply with the true intent and meaning of this section, as the case may be*, he shall, for each and every offence, forfeit and pay the sum of one thousand dollars." 1 Stat. at Large, 649-651.

It is to be considered, then, whether it was the intention of Congress to impose a penalty only upon the omission to make the required report, or also upon the omission to repair to the office of the principal officer of Customs to make it.

And in the first place, it is to be observed, that in terms, it is only the omission to make the said report, or fully to comply with the true intent and meaning of the section, which renders the master liable to the penalty. And if, in point of fact, he do not omit to make the report, the only question would seem to be, whether he has not fully complied with the true intent and meaning of the section, by making the required report at a place within the port, where the officer actually received it. It is somewhat remarkable, that among all the acts required to be done by masters of vessels, in the way of reports and otherwise, there is no other case, under this statute, in which express

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mention is made of doing an act, at the office of the principal officer of the Customs. Thus, in the 19th section, vessels bound to ports of delivery, are required to come to, at the port of entry of the district, "and *there* make report and entry in writing," &c. And so in very many other cases, the act is required to be done at the port, but not at any particular office.

Nor do I find that the statute requires the principal officers to keep one stated and fixed place as and for an office. The 21st section directs them to attend in person at the ports to which they are respectively assigned, but does not make it necessary for them to transact their business at any one place therein. Undoubtedly, this section under consideration implies an expectation on the part of Congress, that the officer will have an office, as it does that he will have stated hours for business; but it makes no requisition to that effect, and leaves both these particulars to be regulated by the executive. And whether the officer shall have one fixed place, or several different places, for the transaction of his business, is manifestly a matter entirely beyond the control of masters of vessels, arriving from foreign ports, who must make the reports to the officer, where he chooses to be found and to receive them.

Moreover, if the required report is in fact made in person to the proper officer, and is received by him, the substantial purpose of the law is answered. It might tend to produce somewhat more regularity and exactness, to have these reports made and received at a stated office; but to secure these, cannot be considered as forming a substantial part of the purpose of a law, which does not even require such an office to be kept, but leaves them to be secured by proper regulations of the Treasury Department, the head of which has ample powers for that purpose.

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I am strongly inclined to think, that what is said in this section concerning repairing to the office, was designed for the relief of masters, by affording them, in some cases, an excuse for not making a report, and to limit more distinctly their obligation to do so, rather than to impose upon them the necessity, in all cases, of repairing thither. It exempts the master from the necessity of looking elsewhere for the officer.

But however this may be, I am of opinion, that if the master does make the required report, in due season, to the proper officer, who receives it, he is not liable to the penalty for omitting to repair to the office, because for this last omission, the act does not in terms impose a penalty, and because the master has, on his part, fully complied with the true intent and meaning of the act, by doing all that is needful to answer its purpose; the clause respecting his repairing to the office, being directory merely, and not intended to compel him to go thither, if the business can be, and in fact is, completely done elsewhere, within the port.

For these reasons I am of opinion, that there was no error in the judgment; for though the Court below, apparently for the purpose of submitting a question of fact to the jury, took a somewhat different view of the Act, the substantial result arrived at was, that a report, seasonably made to the officer, at the port, and received by him, was a compliance with the Act. The judgment is, therefore, affirmed.

Lunt, District-Attorney, for the United States.

Williamson v. The Brig Alphonso and Cargo.

AUGUSTUS WILLIAMSON, LIBELLANT, vs. THE BRIG AL-
PHONSO AND CARGO.

What constitutes a salvage service.

The master has no right to compel the mate to perform a salvage service; and if he does perform one by the order of the master, without objection, he is to be considered as a volunteer.

CURTIS, J. This is a cause of salvage. The material facts are as follows. On the 29th day of August, 1852, the schooner *Fawn*, whereof the libellant was chief mate, sailed from the harbor of St. Thomas, in the Island of St. Thomas, bound for Turks Island, in company with the brig *Alphonso*, bound for Rum Key. The courses of the two vessels being the same, till their arrival off Turks Island, there was an understanding between their masters that they would keep company up to that point. The *Alphonso* was a brig, of about 240 tons burden, and had a master, two mates, five foremost hands, a cook, and cabin-boy. The wife and infant child of the master, and a young servant girl, were on board as passengers. Her cargo consisted of salt, tamarinds, and specie to the amount of about \$6,000; and the vessel and cargo were of the value of about \$15,000.

The second mate of the *Alphonso*, who was shipped at St. Thomas, was able to do duty when he came on board, but he was suffering under an affection of the eyes, which disabled him, so that he did no duty after the first day out. About six o'clock of the evening of Sunday, the day of sailing, the first officer of the *Alphonso* was taken sick. His disease was yellow fever; and during the residue of the passage, he was unable to leave the cabin, and,

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with some lucid intervals, was deranged in mind. The wife of the master was seized, about the same time, with the same disease, and either on Monday night, or Tuesday morning, the master also; so that, after he went below on Monday night, he does not appear to have been on deck. Some time during the morning of Tuesday, the master ordered the crew to set the colors, union down, as a signal of distress. About four o'clock, P. M., this signal, having been observed on board the schooner, she lay to, and waited for the brig; and when the latter came up, the master of the schooner went on board in his boat, found the master and first officer of the brig very sick with the fever, and was requested by the master of the brig to lie by, close to the brig, during the night. The master of the schooner declined to do this, considering it somewhat hazardous; but proposed to send his mate, the libellant, on board, and that both vessels should run into Turks Island, then about twenty-three miles distant. This was assented to; the master of the schooner returned to his vessel, told the libellant to go on board the Alphonso, and keep the light of the schooner in sight during the night; and gave him the course, distance, and bearings of the two vessels from Turks Island. The libellant made no objection, went on board, and took the command. During the night, both vessels lay to, probably because the land being low, and the navigation, in approaching Turks Island, somewhat dangerous, it was not prudent to run for the harbor in the night.

The next morning, the vessels were in sight of each other; they made the land between seven and eight o'clock, A. M., and came to anchor in the harbor about one o'clock, P. M. The weather was fine and clear during the whole time. The master of the brig was taken on shore, and soon after died. The Consul of the United States came

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on board, and took charge of the vessel; and the next day after her arrival, placed a person in command of her.

The libellant entered his action in behalf of himself, the owners, officers, and crew of the schooner; but the owners and master having disclaimed the suit, the libel was amended, so as to go for a salvage compensation to the libellant alone. The District Court decreed five hundred and fifty dollars to the libellant; the claimants appealed, and assigned three reasons of appeal; upon which the cause has been argued here. The first is, that the libellant did not render a salvage service.

It is strongly urged, that both the peril and the service were too slight to bring the case within the technical definition of salvage. But I am not of this opinion. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature.

That such a peril of the sea was impending over the brig, I think appears. She was out of sight of land. Her master and both officers were disabled. A deadly, infectious, or contagious disease had seized two of them and a passenger. It does not appear that any one on board was able to navigate the vessel. There is no presumption that any one before the mast understood navigation, and there is some direct negative evidence that no one was a navigator. The master, judging upon the actual facts, ordered a signal of distress to be made. Under these circumstances, I cannot say that this vessel was not in distress, nor that the peril was so slight, that a relief from it

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cannot rise to the dignity of a salvage service. It is true, she was but a short distance from a port. But the land was not in sight, and the proof shows that there were dangerous shoals in the neighborhood; and it does not appear that the crew, unassisted, knew the bearings of the land, or the course to be steered. It is urged, that the schooner was in company, and therefore there was no real peril. That does not show that the peril, arising from the condition of the officers and crew, was not real; but only that the means of relief from it, by others, who were under no legal obligation to render assistance, were at hand. But in considering the nature of such a service, we must look to the peril which impended, if assistance were not given; not to the ease or difficulty of giving it, or the certainty that it could be obtained from salvors.

It was not argued, that there was any such contract of consortship between the brig and the schooner, as would repel a claim for salvage, upon the ground of a mutual legal obligation to give assistance, if either should fall into distress. Nor is there any thing in the evidence upon which to rest such a position. There was an understanding that the vessels would sail in company, and they did so; but undoubtedly, this meant no more than that they would sail out of port at the same time, and keep along together so far as both should deem it best to do so, without any legal obligation upon the subject. Independent of some usage of the trade, or of some special circumstances, it may well be doubted whether masters have a right to go further than this; and there is no reason in this case to suppose that either intended to go further.

My opinion therefore is, that the schooner rendered to the brig technical salvage service, to be compensated as such. It is, however, but one service, rendered by the owners, officers, and crew of the schooner, in lying by,

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sending on board the brig to ascertain her distress, and putting on board the libellant, to navigate and command her; and through this assistance, bringing her safely into port.

As against these claimants, it must be viewed as one enterprise, to be paid for by one sum of money; though inasmuch as only the libellant makes a claim, it is also necessary to ascertain, as against the claimants, what is his distributive share of the salvage compensation.

And this brings me to consider the second reason of appeal, which is, that the amount awarded to the libellant is excessive.

I do not consider that the schooner was subjected to any appreciable danger, in rendering the salvage service. She lay by during the night; but I think she would have done so for her own safety, it being sworn that it is dangerous to approach Turks Island in the night. Certainly it does not appear, that her lying by was on account of the brig. In the morning, she sailed into her destined port, and the brig followed her. The master of the schooner carried one of the foremost hands from the brig to the schooner, so that the number of his crew was not diminished by the absence of the mate.

In such a case, I consider the owners of the schooner not entitled to any large proportion of the salvage, though, from reasons of public policy, they cannot be altogether excluded therefrom.

The master, who was the author of the enterprise, acted with promptness, discretion, and humanity. He went into the cabin among the sick, ascertained their condition and that of the brig, administered medicines, and exposed himself to some danger of infection. If he had chosen to make a claim, I do not perceive how I could have awarded to him less than to the mate, who, though longer on board

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the schooner, was acting under the responsibility of the master, and by his order. He does not appear to have been in the cabin at all, and consequently was exposed to but little actual danger, until after the salvage service was completed. But, on the other hand, the mate could not certainly know, when he went on board, how long it might prove necessary for him to remain, nor to what extent he would be exposed to the disease. It was suggested, that it did not appear, he knew the yellow fever was on board. It is not stated in terms by any witness. But I cannot suppose that the master of the schooner suffered him to go on board the brig in ignorance of the nature of the disease existing there, or that the boat's crew who brought the master back to the schooner, did not bring with them information of the cause of the distress of the brig, so that it became known to the mate. It is also urged, that he went by the order of the master, and not voluntarily. But the master had no power to compel him to go; and when a master orders either an officer or a man to perform a salvage service to another vessel, and he does it without objection, I think it must be taken, that he goes both by the order of the master and voluntarily. The order sanctions the act, and conveys the assent of the master and of the owners, whose agent he is; but it does not deprive the inferior officers, or the crew, of the merit of voluntary exertion.

These are some of the considerations which have been relied on, as bearing on the *quantum* of compensation.

Considering the amount of the property at risk, which, though considerable, was not very large, the immediate proximity to the port, the presence of the schooner, which was bound to Turks Island, and lay by during the night, as I think, for her own safety; the state of the wind and weather, and the degree of danger to life, actual or rea-

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sonably to be apprehended, my opinion is, that the sum of seven hundred and fifty dollars is a liberal salvage compensation for the actual service. Indeed, aside from the element of danger to life, I should view it as merely technical salvage compensation, and calling for slight compensation. That element is one of great importance; but under the circumstances of this case, it does not seem to me, that the danger, reasonably to have been apprehended by the mate, was considerable. Doctor Stedman, the only medical witness examined, says, it would depend upon the frequency and length of visits to the cabin. Before the completion of the voyage, it does not appear that the libellant had occasion to go into the cabin, and of course, the actual danger of infection was very small. Still, salvage compensation is greatly affected by motives of public policy; by the expediency, for the general good, of bestowing a liberal reward upon those who interpose in circumstances of trial and difficulty; and, speaking generally, there are few occasions more trying to the fortitude and courage of seamen, than those in which they are called upon to commit themselves to an infected ship upon the ocean. When this is done promptly, humanely, and successfully, the public interest requires that the reward should be liberal; and, as I have said, I consider the sum named, upon the actual facts, to be so. Of this sum, I consider the mate entitled to two fifths, or three hundred dollars.

The evidence of payment of his claim is not sufficient. The small sum paid to him was neither offered nor received as a salvage compensation. It is highly probable, the libellant had not then thought of claiming salvage, having acted simply from motives of humanity. But this would not deprive him of a legal right, for which he has not received satisfaction. The sum actually paid to him should, however, be deducted from the sum decreed to him.

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The decree of the District Court must be reversed, and a decree entered here, in conformity with this opinion.

I do not allow costs to either party in this Court. The costs incurred in the District Court are to be paid by the claimant.

Dana and Parker, for the libellant.

F. C. Loring, for the claimant.

**CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.**

MAINE DISTRICT, SEPTEMBER TERM, 1853.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
 preme Court.
 { Hon. ASHUR WARE, District Judge.

JOSHUA W. CARR, ASSIGNEE, vs. STEPHEN GALE, et al.

If a party who is surprised at the trial, allows it to proceed, without making his surprise known and applying for delay, and the verdict is against him, he cannot have a new trial by reason of that surprise.

A new trial will not be granted because a witness, who gave a loose estimate of an amount at the trial, has since become satisfied his estimate was too large:

Nor to contradict a witness, as to a fact of no considerable importance, by negative evidence, given nearly ten years after the event testified to:

Nor to impeach a witness, or disprove a statement which did not materially affect the legal aspect of the case.

The case is stated in the opinion of the Court, by

CURTIS, J. This was a motion for a new trial, on account of newly-discovered evidence. A motion, grounded

on other causes, was argued before the late Mr. Justice Woodbury and the Honorable Ashur Ware, District Judge, at a former term, and is reported in 3 Wood. & Minot, p. 38. That motion was overruled; but the cause assigned in this motion was not then considered, the evidence on which it rested not having been at that time taken in such a form as to be admissible. Owing to the sickness of counsel, and other causes, the motion has lain on file, and was not called up until the present term. The facts and evidence, as they appeared at the trial, are detailed in the report of the case in 3 Wood. & Minot. Among the witnesses examined at the trial, was Joseph Bryant; and a large part of the newly-discovered evidence relates to testimony given by him. At the trial, he testified, that in 1836, he was one of the assignees of S. C. Hemmenway; and that the latter, after the assignment, in connection with his mother, abstracted some of the goods from the store, and collected some of the assigned debts, first making such entries in the ledger as would induce the assignees to believe the accounts were balanced before the assignment was made.

In cross-examination by the counsel for the defendants, who now move for a new trial, he said the amount of the goods so abstracted was somewhere between \$500 and \$1000. The defendants now produce his deposition, in which he says that he did not undertake to state the amount with any precision at the time; that, being much pressed on cross-examination, to fix on some amount, he mentioned the above sums as being in his opinion correct; that he is now satisfied, from an examination of two schedules, and from other circumstances, that he fixed the sum much too high; but the schedules do not give any decisive information, nor can he now fix, with precision, upon the amount. It should be stated, that the evidence of this

witness at the trial was material, only as tending with other evidence, to show that Hemmenway was not destitute of property, at the time when he took the benefit of the bankrupt act.

In our judgment, this evidence, if it could properly be treated as newly-discovered, and were not open to objection on account of want of due diligence, would fall far short of being sufficient cause for a new trial. The testimony now is, that Hemmenway and his mother did abstract some goods. This general fact was all that the plaintiff gave in evidence by Bryant at the trial. The defendants, instead of leaving the statement thus general, called upon him for sums and particulars. He says he undertook to give nothing but a loose opinion as to the amount; and this may fairly be inferred where he does not appear, by the report, to have said more than "somewhere from \$500 to \$1,000." He has now modified that opinion. It would be exceedingly dangerous to allow such changes of mere loose estimates, brought out on cross-examinations, to lay a foundation for a new trial. Besides, it does not appear that all the information, which has caused this change of opinion in the mind of the witness, was not then in his own possession, and might not have been evoked at the trial, by proper inquiries as to the elements or data for the opinion expressed by him.

It is urged by the defendants' counsel, that their clients, not having anticipated this charge of abstracting goods, had not instructed them so as to enable them properly to investigate it. This may be true. But when they found the charge was made, and that they were not in a condition to meet it, a suggestion of surprise, backed by proper evidence of the truth of the suggestion, would have obtained delay for all needful preparation. A party cannot be allowed to wait and take his chance of a verdict in his

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favor, and, when it is against him, allege surprise. It is then too late. I am aware that a different rule has been held in some courts. But the reason is, that by their practice, the remedy could not be had by delaying the trial. In this court, such delay is granted; and the proper remedy here, is to apply for it, and not to wait till after verdict, and then move for a new trial.

Two depositions of the co-assignees of Bryant are also produced, which tend, in some degree, to negative altogether the charge that Hemmenway abstracted any goods, and to show, that though some were taken by his mother, they were all paid for ultimately by her, out of her dividends, under the assignment. But the defendant Hemmenway knew, at the trial, that both these persons were co-assignees with Bryant; that, from their position as such, they would be likely to have information on this subject; and if he believed himself innocent of the charge, and had not then made inquiries of them concerning their knowledge, he had sufficient reason to think they might be able to give evidence concerning it. And it cannot be considered as the use of due diligence, to suffer the trial to proceed, and after a verdict against him, proceed to make the inquiries which he might and ought to have made before. It may be added, that this evidence would be cumulative merely, if produced, and therefore, its discovery is not ground for a new trial.

The defendants have also offered two affidavits of Martin Bates and Thomas P. Cushing, two of a committee of the creditors of Hemmenway, to disprove the statement of Bryant, that he disclosed to the committee the fact that Hemmenway abstracted goods. If the object of this evidence is, as is supposed, to impeach the credibility of Bryant's evidence, it is doubtful, to say the least, whether it is entitled to this effect; because, although ac-

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according to the report of the case, Bryant does speak generally of the committee, yet Mr. Tappan was a member of the committee, whose testimony is not produced; and the witness may have considered communications made to him, and designed for the committee, as made to all of them. But independent of this consideration, we could not grant a new trial merely on account of the contradiction of a witness, otherwise credible, upon a circumstance of very slight importance in the cause, and especially when that contradiction is by affidavits, taken in his absence. If he had been present, he might have reminded the witnesses of circumstances which would have shown them and not him, to be mistaken as to a fact which he testifies to positively, while they only speak negatively, and in the hurry of business may have forgotten, after the lapse of nearly ten years which intervened, in this case, between the event and their testimony.

We have thus examined, in some detail, the evidence relied on; but we do not think it strictly necessary to have done so, because there is a more general consideration, which would be decisive against granting a new trial; and that is, that if the testimony of Bryant were stricken out of the case, it would not materially vary its legal aspect, under the instructions given to the jury, the correctness of which is not in question. There were, in substance, two inquiries to be made by the jury. The first was, whether Hemmenway had carried on business under cover of Gale's name, but really on his own account, for the purpose of concealing his property from his creditors. None of the newly-discovered evidence bears on this question.

The other question was, whether the property, which was the subject of the suit, was property thus concealed. Upon this question, it was not necessary for the plaintiff to show that every part of it was bought by funds which

could be traced as the property of Hemmenway. If the jury were satisfied that, by concert between Gale and Hemmenway, the latter did carry on business in the name of the former, but really on his own account, and that this pretended arrangement was made to conceal Hemmenway's property, and that the goods in question were the stock of that trade, they had a right to infer that funds and profits of Hemmenway were invested in those goods; and if some were purchased on the credit of Gale, that the credit was, as between him and Hemmenway, for the sole benefit of the latter, and that, by force of the agreement between them, the goods, when purchased, were really Hemmenway's goods. In this point of view, it was of but slight importance in the cause, whether, at a certain time, and from a certain source, Hemmenway had \$500, or only a less sum; and therefore it is, that, under no aspect of this evidence, do we deem it to be such as to justify the Court in setting aside the verdict.

We have not observed particularly on the affidavit of Sylvester, respecting the \$4,000 of assigned accounts said to have been collected by Hemmenway, because it was, very properly, admitted by the defendants' counsel at the argument, that the facts disclosed in this affidavit were within reach at the time of the trial, or might speedily have been obtained. This is manifestly so; for, so far as the affidavit states facts, they are drawn from the books of Hemmenway, which were in his possession; and whatever they contained, upon this subject, was within his personal knowledge.

The motion for a new trial must be overruled, and judgment rendered on the verdict.

JOSHUA W. CARR, ASSIGNEE, vs. STEPHEN HILTON.

A creditor of a bankrupt is not a competent witness for the assignee, in a suit to increase the estate.

Evidence that a statement was made to a court by counsel, in the presence of the complainant, who was not a party, is inadmissible.

To avoid the bar of the statute of limitations, the complainant must not only allege his ignorance of the fraud, but when and how it was discovered; and must offer satisfactory evidence to prove these averments.

Information, which makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry might have led.

But a party, thus put on inquiry, is to be allowed a reasonable time to make it, before he is affected with notice.

THE case is stated in the opinion of the Court.

CURTIS, J. A demurrer to this bill was argued and overruled at the September term, 1852. It was then determined, that, as the frauds charged in the bill, though alleged to have been committed more than two years before the institution of the suit, were averred in the bill to have been discovered by the complainant within two years, the cause of action had accrued to the complainant within two years, and so was not barred by the eighth section of the bankrupt act.

The defendant having answered, denying the frauds charged in the bill, has again set up this statute of limitations as a bar, and accompanied it by a denial of the averments of the bill respecting the discovery of the alleged frauds. And evidence has been offered by each party concerning the time of this discovery.

Before considering that evidence, it is material to notice, that, in order to avoid the bar of the statute of limitations,

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the complainant must not only state that the fraud was unknown to him, till within the time allowed by the statute, but he must state when and how it was first discovered. *Stearns v. Paige*, 7 How. 829; *Fisher v. Boody*, *supra*, p. 206.

Some of the evidence in this case, on both sides, is inadmissible. The deposition of Mr. Warren, who is a creditor of the bankrupt, is, for that cause, incompetent. 1 Greenl. Ev. § 392. He is interested to increase the fund, out of which he is entitled to be paid. And on the part of the respondent, those depositions which tend to prove that Mr. Warren, addressing the Supreme Judicial Court of Maine on the hearing of a suit between one Haskell and this respondent, this complainant being then present, stated that he had informed this complainant of the alleged frauds before that suit was instituted, is also inadmissible.

To affect a party by evidence that a statement was made in his presence, which he did not deny, the circumstances must be such as naturally called on him for a denial, if the statement was untrue. Otherwise, it cannot fairly be assumed that he acquiesced in the statement. *Allen v. McKeen*, 1 Sumner, 276, 313; *Melen v. Andrews*, 1 M. & M. 336; *Commonwealth v. Kenney*, 12 Met. 235; Greenl. Ev. § 197.

And when a person, not a party, in a court of justice, hears a statement made by counsel to the court, he not only is not called on to deny it, but ordinarily would be silenced, if he attempted to do so.

All the evidence on this subject is therefore laid out of the case, as irrelevant and incompetent.

There remains only so much of the deposition of Mr. Stewart, as relates to the interview between himself and the complainant, on the twenty-fourth day of February,

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1848. Mr. Stewart deposes, that, on the evening of that day, which was nearly three years before this bill was filed, he called on the complainant, to obtain from him, the office copy of his appointment as assignee in bankruptcy, to file in the suit between Haskell and Hilton. This paper is now produced, and appears to have been filed in the clerk's office on the twenty-fourth day of February, 1848; and there is no reasonable doubt, therefore, that the time of this interview is correctly fixed. He further testifies: "I found Mr. Carr apparently a cautious man, somewhat; and as I was a stranger to him, he seemed indisposed at first to let me have his appointment, without an explanation of the purpose for which I desired it. I thereupon stated to him that purpose, and the reasons for it. I gave him a history of the case from the first; its origin, the motives of the parties, &c. In doing this, I was obliged to, and did state to him the substance of the charges of the bill in that case, which were substantially the same as the charges in the present bill." He then goes into some particulars concerning his statements, and adds: "I stated to him, distinctly and clearly, that Mr. Warren claimed the whole transaction to have been fraudulent as to Smith's creditors, and that his bill in equity was brought upon that ground; and that one ground relied upon in the defence was, that the suit should have been brought by him as assignee of Smith, in bankruptcy; and that he was the only party who could question the frauds, if any had been committed."

The case, then, stands thus. The complainant has offered no admissible evidence to show when and how he first discovered the alleged frauds; the defendant has offered the above evidence of notice to the complainant.

If there was no evidence of notice on the part of the defendant, we should find great, if not insuperable diffi-

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culty, in holding that the bar of the statute of limitations was avoided. If it be necessary for the complainant to aver in his bill, when and how he first discovered the fraud, it is certainly incumbent on him to offer some legal evidence in support of those averments. If a communication was made to him, as he alleges in his bill, in June, 1849, he should have proved it, with all its circumstances, and show that his own conduct, in reference thereto, was such as to lead to a reasonable inference that he then first discovered the alleged fraud. But he offers no legal evidence of such a communication, and he did not file this bill until February, 1851, eighteen months after the alleged time of the discovery; and no reason is shown for the delay.

But, independent of this, we are of opinion, that the deposition of Mr. Stewart shows such a notice of the alleged frauds, as caused the statute bar to begin to run, more than two years before this bill was filed.

The rule respecting notice is well settled. It is correctly laid down in *Kennedy v. Green*, 3 My. & K. 719, 721, 722. "It is the well-established principle, that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of every thing, to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." In support of this, many cases might be cited. It will be sufficient to refer to a few of them. *The Ploughboy*, 1 Gallis. 41; *Hinde v. Vattier*, 1 McLean, 118; *Bowman v. Wathen*, 2 McLean, 376; *Sugden on Ven. & Pur.* 1052, and cases there cited.

Now, the complainant was told that a suit had been brought, founded on the facts alleged in this bill; that it had been prosecuted by respectable counsel; that it was then pending; that if any one could make title by reason of those facts, he alone could. This was clear, direct, and

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specific. It was not only enough to put the complainant on inquiry, but it referred him to the very source from whence this bill came; that is, to Mr. Warren; and informed him where he could find a particular narrative of the charges, and the evidence in support of them.

It must be remembered also, that the complainant was acting in a fiduciary capacity, and that a duty was incumbent on him to make inquiry concerning property of the bankrupt, when he had authentic information that a third person was charged with concealing it, to defraud creditors.

It has been argued, that, as Mr. Stewart was the counsel of Hilton, the Court ought to presume that he represented his client's case favorably, and gave Mr. Carr an impression that his client was innocent of the frauds. But Mr. Carr knew the fact that Mr. Stewart was Hilton's counsel. And if that fact requires the Court to presume that Mr. Stewart's representation would naturally be favorable to his client, it required Mr. Carr to presume the same thing. But in truth, he should have acted not on any mere impressions, but on the specific and substantive facts stated to him; that the frauds had been charged in a bill filed in the Supreme Judicial Court of Maine, by respectable counsel, whom he has now employed in this suit; that the bill was coming to a hearing, and that, in the view of the defendant's counsel, whatever title existed, belonged to him as a trustee for creditors. It was not necessary that he should then believe the frauds existed. It was enough that his attention was called to them, that he was put on his guard, and that he had sufficient information to lead him to the facts. It thus became his duty to know them; and after the lapse of sufficient time to make the necessary inquiries, he must be treated as if he had performed this duty, and did know them. Three

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years, wanting but twenty-three days, elapsed after this notice, before the bill was filed. Eleven months and upwards, is too much time to allow for making the necessary inquiries, considering that both the complainant and Mr. Warren lived in the city of Bangor, that the suit was pending in the county of Penobscot, and that, by an examination of the bankrupt himself, the whole matter could have been sifted to the bottom, in far less time than eleven months.

Our opinion is, that the eighth section of the bankrupt act affords a complete bar in this case; and the bill, for this cause, must be dismissed.

RICHARD R. AIREY vs. THE BRIG ANN C. PRATT AND LEONARD B. PRATT, MASTER AND CLAIMANT.

IN a suit *in rem* by a mate, to recover his wages under the shipping articles, the Court cannot investigate an allegation of misconduct as *master*, while in the temporary command of the vessel as master, in a voyage, during which the master was not on board, with a view of inflicting a forfeiture of wages as mate.

THIS was a libel in the admiralty. The case is stated in the opinion of the Court.

CURTIS, J. The libellant claims his wages, as mate, for the voyages of the brig Ann C. Pratt, which are described in the opinion of the Court in the case of Carrington *et al.* against that vessel, decided at the last term of this court. The claimant alleges a forfeiture of the wages by three different instances of misconduct.

The first is, that the libellant did not bring the brig back

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to St. Michael, when driven to sea from that island. The facts, upon which this cause of forfeiture depends, have been already considered in the case, upon the bottomry bond, (*supra* p. 340,) and the conduct of the libellant found not open to serious objection.

The second ground relied on by the claimant is, that when the brig was driven to sea, there was on board, in a trunk belonging to the master, specie "to the amount of \$1000, or near that sum;" that the libellant broke open the trunk, took the money into his own possession, and has not accounted for it.

That such a trunk was on board, containing some specie, which the libellant took possession of, is admitted. The evidence concerning his having broken the trunk to obtain it is conflicting, and the fact, standing by itself, does not seem to me material. Because, in the actual circumstances in which the libellant was placed, he had a right to take and use this specie. He had become the temporary master of the brig, which needed repairs. This money was on board, and belonged to the owner of the vessel. It was the duty of the libellant to use it in payment for the repairs. If, as the claimant asserts, the trunk was locked, and Captain Pratt had the key, the libellant might properly force the lock. If, as the libellant alleges, the key was left in the lock, he could have no motive to use force upon it, and it would be difficult to believe he did so.

I do not pause to determine this question of fact, for the reasons above indicated, which are in accordance with the ground assumed in the answer. That alleges it to have been the duty of the libellant to apply the specie to make payment for the repairs; and if this be so, the particular mode in which the libellant got it out of the trunk is unimportant, unless it be connected with some other circumstance tending to prove fraud.

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In the account of the disbursements for the repairs of the brig at St. Thomas, the sum of \$307.10 is credited to the vessel, as so much cash received from the libellant; who admits that he retained, for his own use, fifty dollars, and says he paid the sum of \$192.90 "to the crew, and to disburse the vessel," and that this accounts for the whole of the specie which was on board, amounting to the sum of five hundred and fifty dollars only, and not the sum of one thousand dollars, as is alleged in the answer.

Considering that the accounts of Carrington & Co., who were the consignees of the vessel, show large disbursements for the vessel, including payments to and for the seamen, I confess this account by the libellant of these funds, is not entirely satisfactory to my mind. But the claimant has offered no other legal evidence of the amount of the specie on board, or of its disbursement or retention by the libellant. The answer simply declares that there was on board, in specie, the sum of \$1,000, or about that sum, and that the libellant has not accounted for it. Unless the deposition of the libellant, taken in the suit on the bottomry bond, is invoked into this case, I find no evidence whatever to show the amount of specie on board; because this suit being against the master, as well as the brig, his deposition is not evidence. And if the libellant's deposition is to be considered as put in evidence, the whole of it must be read, and taken to be true, unless shown by satisfactory evidence to be false. Though clouded by some grave suspicions, I cannot say that the case affords sufficient grounds upon which to rest a charge of fraudulent misappropriation of money left on board, contrary to the sworn statements of the libellant in his deposition; and, therefore, I do not find this ground of forfeiture to be made out, in point of fact.

It remains to consider the last alleged cause of forfeiture, which is the same investigated in the suit on the bottomry bond. It appears that the libellant, while acting as temporary master at St. Thomas, in concert with the bottomry holder, gave a bottomry bond on the brig for a larger sum than was actually advanced, for the purpose of defrauding the underwriters on the vessel. The question is, whether this misconduct forfeits the wages claimed in this suit.

Forfeiture of the wages of seamen, though in some cases regulated by positive law, rests upon violation of contract, the performance of which is enforced by the marine law by means of this species of punishment. Consequently, before such a forfeiture can be adjudged, it must appear that the contract, under which the wages are claimed, has been violated. It is not enough that some other contract, between the same parties, has been broken, however gross the wrong may be. Now, this is a libel *in rem* by the mate, to recover the wages due to him in that capacity. The claim for wages, as temporary master, can not be enforced against the vessel. It is no part of the subject-matter of this libel, which does not allege it, but confines the demand to the wages due to the libellant as mate, pursuant to his written contract in the shipping articles. The libel lays no foundation for any inquiry into an implied contract, arising out of the emergency of a temporary command, either for the purpose of awarding or withholding compensation, for services rendered in that command. That is a subject, the merits of which can be investigated only in a suit founded on that contract. If it is found to have existed, and to have been so violated as to come within the principles upon which the marine law inflicts a forfeiture, and the pleadings lay the necessary foundation for such an adjudication, a forfeiture of rights, under the implied con-

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tract, for a gross breach of its duties, would follow. But in a suit founded on a very different contract, to recover compensation for services which are unconnected with the duties alleged to have been neglected, I cannot see how a forfeiture can be inflicted. Such is this case; for in his capacity of mate, it is not alleged the libellant was guilty of any neglect of duty. The charge is, that after he had succeeded to the command, and in the course of exercising it, he failed in the honest performance of its obligations. This charge does not seem to me to meet the claim, and, therefore, without prejudice to any rights of the claimant in any suit arising out of the implied contract, I am of opinion it must be dismissed. I think it proper to add, however, that if it had appeared that the misconduct of the libellant had occasioned damage to the claimant, I should have thought it proper to suspend the decree until he could have an opportunity to bring a suit for its recovery, to the end that a set-off might be made; and also, that, as the libellant admits he appropriated to his own use the sum of fifty dollars, he must be taken to have done this in the only way in which it was honest for him to do it, and that was as part payment of his wages; and so, this amount must be deducted from the amount of his wages.

I do not think he can qualify his own wrong, in taking this money from the funds of the vessel, and sending it home, by alleging he did it in his capacity of temporary master, and so will account in that capacity, and not as mate. He had no right to take it in the capacity of master or mate; and I consider it my duty to treat it as part payment of his wages; the only debt, so far as now appears to the Court, due to him from the vessel or the owner.

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As this deduction does not appear to have been made in the District Court, its decree must be altered in this particular ; in all other respects, it is affirmed, I allow no costs on the appeal to either party.

Rowe, for the libellant.

W. P. Fessenden, contra.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

MASSACHUSETTS DISTRICT, OCTOBER TERM, 1863.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. PELEG SPRAGUE, District Judge.

IASIGI et al. vs. BROWN et al.

The 15th section of the Act of September 24, 1789, (1 Stat. at Large, 82,) empowering the courts of the United States to compel the production of books and papers in trials at law, has so far altered the common law as to inflict upon the party the penalty of a nonsuit or default, upon the non-production of a paper, instead of merely letting in the opposite party to parol proof.

An order to produce may be applied for before trial, upon notice.

A *prima facie* case of the existence of the paper, and its materiality, must be made out, and the Court will then pass an order *nisi*, leaving the opposite party to produce, or show cause at the trial, where alone the materiality can be finally decided.

The fact that a bill of discovery has been filed and answered, but the papers not produced, is not a bar.

THIS was a motion, grounded on affidavit, to compel the production and delivery to the clerk of the court, of certain

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papers alleged to be material on a trial at law of this action. The existence of the papers and their materiality, were not denied. But the motion was resisted on the ground that the party moving had already filed a bill of discovery, covering many of the facts of the case, and, among others, these documents; and though copies of them had not been annexed to the answer, yet their contents were described; and it was urged that, having resorted to this mode of discovery, the party must read the answer, and could not have the benefit of the order under the act of Congress.

CURTIS, J. By the common law, a notice to produce a paper, merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery.

The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the Court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a court of

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equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen.

If the notice is made before the trial, the correct practice seems to me to be, after the moving party has made a *prima facie* case, to enter an order *nisi*; leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause.

I think such an order should be made in this case. The fact that a bill of discovery was filed, is not a bar. If the answer contained what it alleged to be copies of the papers, the party would still have a right to use the originals. He is not bound to act upon the assumption that the copies are correct; and, in some cases, correct copies are not equivalent to originals. Under the laws of the United States, both the remedy by a bill of discovery, and by an order to produce, are given. If a party chooses to go to the expense of both, the Court cannot deprive him of one of them, unless it can clearly see that the other has been completely effectual, so that any further proceeding must be simply useless, or intended to harass the other party. That is not so here. The answer does not contain, or annex, even copies of the papers called for.

Let an order be entered to produce, at the trial, the papers described in the motion, or show cause at the trial why the same are not produced.

Barnard *et al.* v. Morton.

GEORGE M. BARNARD *et al.* vs. MARCUS MORTON.

The sixteenth section of the Tariff Act of August 30, 1842, (5 Stat. at Large, 563,) is not repealed by the Tariff Act of July 30, 1846, (9 Stat at Large, 42,) and still prescribes the rule for ascertaining the dutiable value of merchandise, procured by purchase, on which an *ad valorem* duty is imposed. The expense of sacks, in which salt is packed for importation from Liverpool, is embraced under the words "all costs" in that section, and is to be added to the market value, to ascertain the dutiable value.

THIS was an action for money had and received by Barnard, Adams & Co., against Marcus Morton, late Collector of the Customs for the Port of Boston, to recover a sum of money alleged to have been illegally exacted as duties. After introducing witnesses, the substance of whose testimony appears in the opinion of the Court, the parties agreed, that, upon this evidence, and the law applicable thereto, the Court should direct a verdict.

CURTIS, J. On the third day of February, 1849, Messrs. Barnard, Adams & Co. entered, at the custom-house in Boston, 2670 sacks of salt, imported from Liverpool. The invoices specified, first, the cost of the salt; second, the number and cost of the sacks in which the salt was imported; third, the charges, consisting of river freight, dock and town dues, mats, cartage of sacks, and filling; and fourth, the commissions. The Collector assessed the *ad valorem* duty of twenty per centum on the footing of the invoice. The plaintiffs protested against so much of the duty as was thus imposed on the cost of the sacks, and, having paid it, this action is brought to recover it back.

The plaintiffs have called witnesses, skilled in the trade, who have testified, that long before the tariff law of 1846,

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invoices of salt were accustomed to be made as these are made; that the cost of the sacks in which the salt is exported, had not usually or ever been included among the "charges." One witness, who had been extensively engaged in the trade for ten years, and had resided in Liverpool one half that time, testified, that the salt exported from Liverpool is chiefly made in the county of Cheshire; that the manufacturers have agents at Liverpool, who sell it, deliverable either at the works, or at the port of Liverpool. It is sold in bulk, by the ton, and the purchaser directs it to be packed in bleached or half-bleached sacks, the former for fine salt, the latter for coarse. Except some fine salt, known as "Factory-filled salt," it comes down the Mersey in bulk, and is filled on board, or alongside the vessel in which it is exported, at the expense of the purchaser. The seller procures the bags for the purchaser, and makes a separate charge to him of their cost; and the invoices make the bags a distinct item. The *charges* in the invoices are the expenses incident to getting the article on shipboard. The seller of the salt procures the sacks, puts the salt in them, and charges the salt and the sacks to the purchaser; this is the cost of the salt; then the charges are added. The whole constitutes the cost of the cargo.

The other witnesses, called on both sides, confirm this statement, so far as their knowledge extends; and they add nothing to it, except the fact that salt in bulk, and bag-salt, is each a distinct and well-known article of commerce in the United States.

Upon these facts, the question is, whether the cost of the sacks is to be added to the cost of the salt in bulk, in ascertaining the dutiable value of salt imported in sacks from Liverpool.

The law, under which this duty was exacted, is the Act

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of July 30, 1846, 9 Stat. at Large, 42. This law does not contain any provisions directing the mode in which the dutiable value of articles, upon which it levies an *ad valorem* duty, shall be ascertained. And the first question raised, and to be determined, is, whether any, and what other law or laws, are so far left in force by this act, as to give the rule for ascertaining the dutiable value of merchandise on which the tariff of 1846 imposes *ad valorem* duties.

It is argued, by the plaintiff's counsel, that this act has repealed the preceding Tariff Act of August 30, 1842, including the sixteenth and seventeenth sections, which prescribe the mode of ascertaining the dutiable value of merchandise procured by purchase.

The Act of 1846 contains no other repealing clause than what is found in its seventh section. "That all acts and parts of acts repugnant to the provisions of this act, be, and the same hereby are, repealed." But this act imposes throughout *ad valorem* duties; and, as already observed, it contains no specific provisions as to the instrumentalities, by means of which the dutiable values of the articles it subjects to duties are to be ascertained, or the times and places in reference to which such values are to be computed, or the items which are to be reckoned as part thereof. Yet such provisions are not only proper, but, as has been shown by experience, are necessary parts of a just and equal system of laws, levying *ad valorem* duties, and have been so treated since the year 1823 in the legislation of Congress. It follows, that the then existing provisions of law on those subjects, so far from being repugnant to this Act of 1846, are needful, to carry it into practical effect; and, therefore, could not be considered as repealed by its eleventh section, even if there is found in it no express reference to existing laws, as affording rules on these subjects.

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This question of repeal was argued as if it depended on the interpretation to be placed on the eighth section of the Act of 1846; and the plaintiffs' counsel insisted, that this section was, throughout, applicable solely to cases of additions made to the invoice cost of imports by the owner, consignee, or agent; and consequently, that the reference made therein to existing laws, adapted them for such cases only. This section is in these words:

"That it shall be lawful for the owner, consignee, or agent of imports which have been actually purchased, on entry of the same, to make such addition in the entry to the cost or value given in the invoice, as, in his opinion, may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured or produced, as the case may be; and to add thereto all costs and charges which, under existing laws, would form part of the true value at the port where the same may be entered, upon which the duties may be assessed. And it shall be the duty of the Collector, within whose district the same may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws; and if the appraised value thereof shall exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value."

Perhaps this is the true interpretation of the section. But it by no means follows that cases not within it are not to be subject to existing laws, both as to the mode of ascertaining the dutiable value, and the assessment of an additional duty of twenty per centum, in case that ap-

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praised value shall exceed the declared value ten per centum or more. It would be strange, indeed, if this penalty were to be inflicted when an attempt was made by the importer to correct the invoice value before entry, and were not to be inflicted when no attempt was made to correct it; and it would be still stranger, if the law pointed out a mode of ascertaining the dutiable value in the former class of cases, but left the latter, probably far the larger class, without any mode of ascertaining that value, save by the invoices made abroad. If, therefore, the eighth section is to receive the interpretation contended for, a point which I do not find it necessary to determine, the inference would be, that having made special provision for a particular class of cases of altered values, it was thought necessary, by express terms, to bring them under the same existing provisions of law, as all other cases were to be governed by; and that therefore it was, that in respect to them, there is an express enactment to that effect; while all other cases are left to be governed by those existing provisions which are not repugnant to the law of 1846, but are necessary to its just and equal execution.

The sixteenth and seventeenth sections of the Act of 1842 were not designed to be applicable merely to cases arising under that law. The sixteenth section begins as follows: "That in all cases where there is or shall be imposed any *ad valorem* rate of duty, &c., it shall be the duty of the Collector to cause the actual market value, or wholesale price thereof, at the time when purchased, &c., to be appraised, estimated, and ascertained," &c. And then follows a set of provisions to enable the Collector to discharge this duty. This system, digested from former laws, with some alterations, was in force when the *ad valorem* tariff of 1846 was enacted; and the inference is irresistible, that it is to continue to operate upon all cases of *ad va-*

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lorem duties levied on merchandise procured by purchase, under this Act of 1846, which has made no new provisions on the subject.

It was argued that, by the Act of March 3, 1851, (9 Stat. at Large, 629,) Congress has, in terms, made it the duty of the Collector to cause the dutiable value of articles to be appraised, estimated, and ascertained; and that this shows it was not previously his duty, and proves that there was an omission in the law of 1846, which it was the object of this law of 1851 to supply. But a close examination of this last mentioned law, and of the circumstances in which it was enacted, will lead to an opposite conclusion.

Just before this law was enacted, an interpretation had been put by the Supreme Court on the fifth section of the Act of March 1, 1823, (3 Stat. at Large, 732,) and on the sixteenth section of the law of 1846, to the effect that the value, *at the time of the procurement* of merchandise imported from the country of its production, was the value to be ascertained. *Greely v. Thompson*, 10 How. 225; *Maxwell v. Griswold*, 10 How. 242. The practice at the custom-house, under instructions from the Treasury Department, is understood to have been to ascertain the value at the time of exportation. This law of 1851, in its first section, enacted — "That in all cases where there is or shall be imposed any *ad valorem* rate of duty, &c., it shall be the duty of the Collector, &c., to cause the actual market value, or wholesale price thereof, *at the period of the exportation, to the United States*, to be appraised, estimated, and ascertained," &c.

The purpose of Congress clearly was, to repeal so much of the fifth section of the Act of 1823, and of the sixteenth section of the Act of 1842, as fixed the time of procure-

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ment as the period, in reference to which the value was to be assessed; and substitute therefor the time of exportation. This clearly implies that Congress considered the sixteenth section as still in force. And in this law, also, no means of fixing the value are provided; and there is, therefore, a tacit but clear reference to the modes which theretofore had been provided for that end, by the sixteenth section of the Act of 1842, in cases of imports purchased, and by the Act of 1823, in cases of imports procured otherwise than by purchase.

I say the modes provided by these two laws; because it seems, from the terms of the sixteenth section of the Act of 1842, that it can be applied only to imports procured by purchase, and that if procured otherwise than by purchase, it is still necessary to recur to the provisions of the Act of 1823, which required proceedings differing materially from those of the Act of 1842.

It may be added, that though the question now made concerning the repeal of the sixteenth section of the Act of 1842, has not, so far as I am aware, been distinctly presented before; yet the case of *Griswold v. Maxwell* proceeds upon the ground that it is not repealed. And it has been treated as in force in many cases. *Morlot v. Lawrence*, 1 Blatch. R. 608; *Norcross v. Greely*, *supra*, p. 114.

It is a question of so much importance, that after it had been argued at the bar, I thought it proper to consider it somewhat more at large than its intrinsic difficulty, perhaps, required.

This section of the Act of 1842 being in force, we must look to it for the rule governing this case, which is one of purchase. It requires the Collector to ascertain the dutiable value of this import, by adding to its market value, "all costs and charges, except insurance, and including in

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every case a charge for commissions at the usual rate, as the true value at the port where the same may be entered, upon which duties shall be assessed."

The object of the law is, to ascertain the true value of the article at the port where the same is entered; and the mode of ascertaining that value is, to add to the market price abroad, all costs and charges.

The article entered was salt. But it appears there are two kinds of salt known in this market; salt in bulk, and bag-salt. The latter is what the plaintiffs entered. Their entry is, "2670 sacks salt." The question is, whether the price of the sacks is a cost or charge, within the meaning of this law. That it is, in point of fact, one of the expenses incurred abroad, to give the article the character of bag-salt, is clear.

But it is insisted that it is not one of the charges, within the meaning of this law, because it has never been known as such to merchants. This may be admitted; but is it not one of the costs of the article known as bag-salt? It is argued that "all costs and charges" means no more than all charges. But it is the duty of the Court, in construing a statute, to give effect to every word used by the legislature, if an appropriate meaning can be attached to it. And inasmuch as the cost of the bags is in fact one of the costs of the article entered, if it be true that it cannot come under the word "charges," an appropriate effect can be given to the word "costs."

Among the items, denominated "charges" in the invoices, are the expenses of carting the bags. It is not denied in the protest, nor is there any ground to deny, that this is properly denominated one of the charges, and is to be added to the market value of the salt. If so, it would be strange, if the expense of the sacks themselves were to be excluded.

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Take the definition of the word "charges" given by one of the witnesses — the expenses of getting the article on ship-board; if the cartage of the sacks comes into the charges, it must be because the sacks are a component part of the article bag-salt; and if so, the cost of the sacks is one of the costs of that article.

This word "costs" is used for the first time, I believe, in this law, in addition to the word charges. See Acts 1823, 3 Stat. at Large, 732 § 5; 1828, 4 Stat. at Large, 273, § 8; 1832, 4 Stat. 593, § 15. And I do not perceive any sound reason why it may not be so construed as to cover the expense of packages, in which imports usually purchased in bulk are placed, after the purchase, and before exportation. This expense is strictly one of the costs of the article as imported, and at the same time it does not enter into the market value of the article abroad, which is sold in bulk, as it would, if there sold in such packages. It differs, also, entirely from the case of a duty expressly levied upon the article in such packages, as upon wine in bottles; and from the case of a specific duty upon salt, as under the Act of 1832.

My opinion is, that the cost of packages, into which articles purchased in bulk are placed, before exportation, by means of which the article, when thus imported, has acquired in commerce a distinct character, as bag-salt, in contradistinction to salt in bulk, is one of the costs of that import, within the meaning of the sixteenth section of the Act of 1842; and consequently, that the cost of the sacks was in this case properly included in the sum on which the duty was to be assessed.

Pursuant to the agreement of the parties, a verdict is to be directed for the defendant.

Choate and Bell, for the plaintiffs.

Hallett, (District Attorney,) for the defendant.

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JOHN KRIESLER *vs.* MARCUS MORTON.

Under the act of February 25, 1845, (5 Stat. at Large, 727,) requiring a protest in writing, at or before the payment of duties, to enable the party paying to maintain an action, no substantive ground of objection to the payment, not contained in the protest, can be taken at the trial.

A protest having stated only, that the invoice value was correct, the plaintiff was not allowed to show that the appraisement was not made in conformity to law.

The fact that the Deputy Collector dictated the form of the protest, does not estop the Collector from denying its sufficiency for a purpose, which does not appear to have been brought to the notice of the Deputy Collector.

THIS was an action for money had and received against the defendant, who was formerly Collector of the Customs for the Port of Boston, to recover an excess of duties alleged to have been illegally exacted.

At the trial, the plaintiff produced the entry of the merchandise, in which its value was declared on oath, in the usual form, and then showed that he had been compelled to pay, in addition to the *ad valorem* duty imposed by law, a duty of twenty per cent. The merchandise consisted of fruit and raisins imported from Malaga, and entered in October, 1848. Previous to paying this additional duty, the consignees of the plaintiff, who is a foreign merchant, made the following protest: "We hereby protest against paying the additional duty, on the within goods, as we consider them fairly invoiced at the time and place of exportation."

The plaintiff here rested his case. The defendant then called one of the government appraisers of the port of Boston, who produced an appraisement in writing, signed by himself and another government appraiser, by which it appeared, that they valued the goods as of the time and

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place of exportation. It was admitted that the goods were the product of the country whence they were exported. It further appeared that the plaintiff, having appealed from this decision of the appraisers, two merchant appraisers were appointed by the Collector, who also valued the goods as of the time and place of exportation, and decided that that value exceeded the invoice value by more than ten per centum. But these appraisers did not actually see and examine the goods.

The plaintiff's counsel insisted, that both these appraisements were void, and consequently not sufficient in law to displace the value as declared in the entry, because the valuation should have been as of the time and place of procurement, and because the merchant appraisers did not see the goods. But the Court ruled, that as neither of these grounds of objection to the payment was specifically pointed out in the protest, they were not open to the plaintiff on the trial.

The plaintiff then offered to prove, that the form of the protest was dictated by the Deputy Collector, and he read a circular from the Secretary of the Treasury, under date of May 15, 1845, (1 May. 318,) in which it is said: "It will be but just to importers, who may hereafter manifest dissatisfaction at the charge of duties, and doubt of their legality at the time of their payment, or prior thereto, to make them fully aware of the requirements of the act referred to, in relation to protests." And he insisted that the defendant was estopped from denying the sufficiency of the protest. But the Court excluded the evidence and the defendants had a verdict. The plaintiff moved for a new trial.

CURTIS, J. The questions involved in this motion, are of very considerable importance, because they are under-

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stood to affect other cases, and certainly have a direct bearing on the practice of merchants in making their protests.

The principal question is, whether the plaintiff had complied with the requirement of the last clause of the Act of Congress of February 26, 1845, 5 Stat. at Large, 727. It is as follows: "Nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth, distinctly and specifically, the grounds of objection to the payment thereof."

Did this protest set forth distinctly and specifically the grounds of objection to the payment of the additional duty of twenty per cent?

The Act of July 30, 1846, § 8, (9 Stat. at Large, 43,) requires "the Collector within whose district the same may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained in accordance with existing laws; and if the *appraised value* thereof shall exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duty imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value."

It is questionable whether the whole of this section does not apply solely to the cases of declarations of increased values voluntarily made by the owner, consignee, or agent, before entry. But this is not material in the present case; because it has been determined in the case of *Barnard v. Morton*, that if this express reference to existing laws, contained in the eighth section of the Act of 1846, does not make them applicable to other cases than those mentioned in the first part of that section, still the sixteenth and

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seventeenth sections of the Act of 1842, were in force as to goods procured by purchase ; and this law makes it the duty of the Collector to impose an additional duty, in case the appraised value exceed the declared value a certain amount.

Neither of these laws refers to the actual value, as ascertainable by evidence *aliunde*, but exclusively to the appraised value. If the appraisement results in this greater sum, the penalty must, by law, be imposed, and it is no answer to such a case, for the importer to assert that his declared value was the true value. Such an assertion, even if proved, displaces no element in the case required by law to be visited with the penalty. It would still be true that the appraised value exceeded it, and that the Collector had legally exacted the additional duty. It follows that the only grounds open to the importer in such a case are, to deny that the appraisement was made, in accordance with existing laws, or that it had resulted in that excess over the declared value, which requires the Collector to impose the penalty. On the trial of this case, the plaintiff denied the former of these, viz. that the appraisement was made in accordance with the law. His grounds were, that the law required the appraisers to see the goods, and to appraise their value as of the time and place of procurement ; and that, in point of fact, they did not see the goods, and did appraise them as of the time and place of exportation.

But the protest does not set forth or allude to either of these grounds of objection. It simply says, the invoice value is the true value ; which, as already stated, is not a valid ground of objection, and certainly is not the ground now relied on.

It has been suggested at the bar, that, in some former cases, the same form of protest has been held sufficient to enable the plaintiff to recover after an appraisement. It

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is quite possible, that protests in this form have come before the Court in other trials. I have a recollection of one such case; and it may be, that objections have been taken, at the trial, to such protests, and that such objections were held not to be tenable. But that this precise objection has ever before been pointed out, I am not aware. It having been pointed out in this case, I have considered it, both at the trial, and again on this motion. It seems to me to be necessary, under this Act of Congress, to set forth, in the protest, every ground of objection to the payment protested against; and, as a necessary consequence, no ground can be taken at the trial, which does not there appear. These protests are commercial documents, usually made in the hurry of business, and entitled to a liberal interpretation. No technical precision should be required. But they must allege, distinctly and specifically, every substantive objection to the payment, so that it shall appear that it was in the mind of the party, and was brought to the knowledge of the Collector.

I think the plaintiff did not comply with this requirement of the statute, and, consequently, can not maintain this action, unless the other point, that the defendant is estopped, is tenable.

Passing by the questions, whether it is in the power of the Collector himself to waive the performance of what the Act of Congress requires, and, whether the act of the Deputy Collector, in this behalf, binds the Collector, I am not able to perceive, in this case, ground for an estoppel to prevent the Collector from insisting on the objection to the protest now taken. That objection is, in substance, that the protest is not so drawn as to enable the plaintiff to deny that the appraisers saw the goods, or appraised their value as the law requires. There is an additional fact

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stated in the motion for a new trial, as newly discovered, viz. that in making the appraisement, the appraisers were governed by an invoice of fruit imported into New York, without knowing its quality when compared with the plaintiff's goods. This fact, if legitimately in the case, can have no influence, save in connection with the fact that the appraisers did not examine the plaintiff's goods. But it was not offered to be proved, that the Deputy Collector, when he gave the advice about the form of the protest, was made aware that the appraisers did not see the goods; the affidavit of Mr. Worthington states that this fact was afterwards discovered; but when, in reference to the date of the protest, does not appear; and, therefore, neither the Deputy Collector, nor any one bound by his act, can be estopped from denying the applicability of the protest to a state of facts not laid before him; and as to the other objection, that the appraisement of the value was not made as of the time of procurement, but as of the time of exportation, there is not the least reason to suppose that the plaintiff, at that time, any more than the Deputy Collector, believed that was an objection, or intended to embrace it in his protest as one ground of objection. It was not until the decisions of the Supreme Court, in *Greely v. Thompson*, 10 How. 225, and *Griswold v. Maxwell*, 10 How. 242, that it became known that this mode of proceeding at the custom-house, under the instructions of the Secretary of the Treasury, was not in conformity to law, and this protest shows that the plaintiff did not then rely on this objection, for it makes reference to the time of exportation, as the time, in respect to which the correctness of the valuation is to be judged. To let the plaintiff in now, to a ground not taken in the protest, because the Deputy Collector did not apprise him of the necessity of

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taking an objection, not then thought of by either of them, would be carrying the doctrine of estoppel to a dangerous length.

The motion for a new trial is overruled, and judgment is to be rendered on the verdict.

OLIVIA B. WARD *et al.* vs. JAMES S. AMORY *et al.*

An express limitation in a bequest or devise, should not be held to be controlled by implications drawn from other provisions in the will, if the latter, by any fair intendment, can be reconciled with the former.

A power of disposal by will, does not enlarge an interest in the donee of the power, beyond what is expressly limited.

The quantity of estate taken by trustees depends on the purposes of the trust.

A devise of a fee to trustees and their heirs, with authority to sell, is consistent with an executory bequest of the fee to others, after a life estate.

The rule in Shelly's case is not applicable to a devise of an equitable estate for life to the ancestor, and a legal estate, after the termination of the life estate, to the heirs.

On a bill by husband and wife, to recover property of the wife, the Court directs a settlement on the wife, unless satisfied, upon a separate examination of the wife, that it is voluntarily waived.

THIS was a bill in equity to enforce the trusts of the will of Mrs. Sarah W. Sullivan. The bill was filed by three married daughters, and one unmarried daughter, of the testatrix, (the former suing by their next friends, their husbands being also complainants,) the two surviving sons of the testatrix, (one son, John T. S. Sullivan, named in the will, having died, in the lifetime of the testatrix,) and Anne Stewart Newton, a granddaughter of the testatrix, who, being a minor, also sues by her next friend, against James S. Amory and Stephen H. Perkins, the trustees named in the will.

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The questions raised, and the clauses in the will giving rise to them, are stated in the opinion of the Court.

CURTIS, J. The complainants allege, that by the will of Mrs. Sullivan, they have severally become equitably entitled to certain real and personal estate, now held in trust by the respondents, and they pray to have those trusts executed, and the legal title to the property conveyed to them. The trustees claim no beneficial interest in the property for themselves, but they deny the titles, which the complainants assert in their bill. The principal question is, whether by the will, the complainants acquired the titles on which they now rely.

The clauses in the will, having a material bearing on this question, are as follows :

“ And I do now, therefore, hereby devise and bequeathe as well the said estate of my late husband, now in trust, as aforesaid, as all other property, real, personal and mixed, to which I have any title in my own right, however derived to me, and of which I may die seised or possessed, or may rightfully claim, to James S. Amory, of said Boston, and Stephen H. Perkins, of Brookline, in the county of Norfolk, and Commonwealth aforesaid, merchants, to them and to their heirs and assigns, and to the survivor of them, and to the heirs and assigns of such survivor, and to such successor or successors as the Judge of Probate may appoint, hereby requesting said Judge of Probate to make appointments as vacancies may occur, so that the trust herein provided for may be duly executed. This bequest and devise to said James S. Amory and Stephen H. Perkins, is in trust nevertheless to them, their successors and assigns, for the following purposes, viz. *First*, to pay my just debts. *Second*, after providing for all costs and charges of executing this trust, my will is that the residue of the estate be

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divided into eight equal shares, and that *the income or interest of one share be paid to my son James S. Sullivan, and to each of my two sons, John T. S. Sullivan and Meredith Sullivan, and to my four daughters, Sarah W. Oakey, Olivia B. Ward, Marianne A. Schley, and Hephsebah S. Sullivan, each the income of one share, and to Anne Stewart Newton, my grandchild, likewise the interest or income of one share during the respective lives of all my said sons and daughters, and of my said granddaughter. And as to the share of the estate, to the income of which, as above provided, my children are to be entitled respectively, my will further is, that in case any one or more of them die before me, their heirs at law shall respectively be entitled to have and receive the portion or portions of income that would have come to such sons or daughters, or to my granddaughter, had they survived me, and to the portion of the principal that would come to them in like manner. And such of my said sons and daughters as survive me and my granddaughter, (the coverture of the daughters, and granddaughter, if they are married, notwithstanding,) shall have power to dispose of their interest in the estate by will as they see fit. And if one or more of them die intestate, their share of the estate shall go to their heirs at law respectively. Provided always, that none but Anne Stewart Newton's maternal relations shall be recognized as heirs at law, or be considered as capable of taking under this will. And as to the shares in the estate which are to go to my daughters and granddaughter, as above provided, my will is, that they be considered their separate property, and free from all liability under any contracts of their husbands respectively, or their creditors, that is, the creditors of their husbands (their coverture notwithstanding.) Third. I do hereby authorize and empower James S. Amory and Stephen H. Perkins, before named, their associates, and any*

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future trustee, or their successors as aforesaid, to make and execute any deed or deeds of the real estate held by them under this trust and to convey the same for any consideration which they may think proper, and in as full and ample a manner as I could do myself.

“ And I do authorize and empower them to alien, sell, convey, and change and reinvest any personal estate of which they shall become possessed as trustees under this instrument, at their discretion; each one being responsible for his own acts only, and not for the acts of any other trustee, and I desire that no bonds be required at the probate office, of my trustees above named. *Fourth.* Having entire confidence in said James S. Amory and Stephen H. Perkins, I do hereby make them joint executors of this will, as well as trustees, and I request them to accept the trust, inasmuch as I shall feel that I shall have done the last service in my power for my family, if they will take upon themselves this trust and the execution thereof.

“ In witness, &c., this 28th of September, 1848.”

The complainants allege that the fee-simple in the realty, and the whole equitable interest in the personalty, passed to them; and this upon two grounds.

First: because such appears to have been the intention of the testatrix, as gathered from the whole of her will.

Second: because, so far as respects the realty, the rule in Shelly's case gives the fee-simple to them, as the first takers of an estate of freehold, to whose heirs the remainder is limited.

The first of these grounds raises a question of construction; the second depends on the applicability to this case of a well-known rule of law, which operates, if at all, wholly irrespective of the intent of the testatrix.

Upon the first of these inquiries, it is clear, that, by the second clause of the will, the testatrix has expressly given

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to her grandchild, and to each of her children, a life estate; but it has been ingeniously and learnedly argued that the words, "during the respective lives of all my said sons and daughters, and of my granddaughter," are controlled by subsequent provisions of the will, showing an intent to devise and bequeathe to them the fee-simple of the realty and the principal of the personalty.

It is necessary to distinguish the realty from the personalty, because different rules are applicable to each.

Where the interest or income of a fund is bequeathed through a trustee, or directly to the legatee, without any words limiting the donation of the trust, or the enjoyment by the legatee, the principal is regarded as bequeathed to him. *Philips v. Chamberlain*, 4 Ves. 51; *Haig v. Swiney*, 1 Sim. & Stu. 487; *Hawkins v. Hawkins*, 7 Sim. 178; *Clarke v. Gould*, 7 Sim. 197; *Earle v. Grim*, 1 Johns. C. R. 494.

But if it appears from the context, that only the produce of the fund was intended for the legatee, the principal does not pass; and one mode in which this may appear is the insertion of words limiting the duration of the trust, through which alone the legatee is to take. *Cooke v. Bowler*, 2 Keen, 54; *Scott v. The Earl of Scarborough*, 1 Bev. 154; *Clowes v. Clowes*, 9 Sim. 403; 2 Roper on Leg. 1477, and cases there cited.

In this will, there are not only the express words confining the interest of the legatees in their income to their lives, but there is no provision for extending the duration of the trust, through which they are to take, beyond their lives; no duty being imposed on the trustees to receive the income, or pay it to any one, after the decease of the legatees. Standing alone, therefore, there would seem to be no doubt that this clause in the will would not bequeathe

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the capital or principal to the legatees, but only the income during their lives.

Indeed, this has not been questioned by the complainants' counsel; but he correctly argues that we must look at the whole will, and he insists that other parts of it are sufficient to control this clause, and to show that the testatrix really intended to give the whole fund.

There is one general observation, which I think entitled to weight; in construing a will, so inartificially drawn as this is, it is unsafe to set aside the express terms employed by the testatrix in the very clause in which the bequest is made, because it is found not easily reconciled, or perhaps not completely reconcilable with language used in other parts of the instrument. It may reasonably be assumed, that when the testatrix made the provision that her children should take the income through trustees during their lives, she was aware of the effect of the terms she employed, and intended what she there expressed; while in making other provisions subsidiary to this bequest, she might be inattentive to the effect of her language upon the bequest already made, and which may be supposed in some degree to have passed out of her view; and, therefore, when an intent has been once clearly expressed in a will, and the instrument then goes on to deal with other subjects, this clear intent should prevail, unless it is plainly modified or controlled by what is subsequently said.

In this case, it is argued that the power of disposal by will, shows clearly the testatrix meant to bequeathe, not the income merely, for life, but the whole fund. The power is in these words: "And such of my said sons and daughters as survive me, and my granddaughter, (the coverture of the daughters and granddaughter, if they are married, notwithstanding,) shall have power to dispose of their interest

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in the estate by will as they see fit; and if one or more of them die intestate, their share of the estate shall go to their heirs at law respectively."

That a power of disposal by will does not, of itself, enlarge a limited interest, is well settled. A bequest to A for life, and after his death to such person as he may appoint, by will, to receive the same, gives only a life estate to A, and no one can claim through him, save by an execution of the power. *Croft v. Slee*, 4 Ves. 60; *Nannock v. Horton*, 7 Ves. 391; *Bradley v. Westcott*, 13 Ves. 445.

But it is insisted that the testatrix speaks of what is to be devised by the children, as their interest in the estate, and what is to be inherited as their share of the estate; and that this necessarily implies that the interest of each child was not to be limited to his or her life. This argument must be admitted to have much weight, but when examined by all the lights gained from the whole of the will, it is not decisive.

The testatrix had previously directed that her estate should be divided "into eight equal shares, and that the income or interest of one share should be paid to each of her children and her grandchild, during their respective lives." She is now providing further, that each may dispose, by will, of that share which had been set apart for his or her use, and, failing to make a will, that it should go to his or her heirs at law. Apparently she considered each of these shares as so bequeathed that it might be spoken of as the share of the child to whose use it was devoted during life, at whose disposal, by will, it was left, and to whose heirs it was to go in case of intestacy. And she uses the words, "their interest in the estate," as synonymous with "the shares in the estate set apart for their use." In the very next clause this is apparent; for she there uses the phrase, "and as to the shares in the estate, which are to

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go to my daughters and granddaughter, as above provided," &c. Now, the manner in which those shares were to go to them, "as above provided," was for life; so that the testatrix here uses the words, "the shares in the estate which are to go to my daughters," simply as indicating the shares set apart for their respective use. A few sentences above, she said, "and as to the share of the estate to the income of which, as above provided, my children are to be entitled respectively," &c. Here she has inserted the full and accurate description of the subject. In the other clauses, she describes more loosely and inaccurately; but it is apparent she all along refers to the same subject. It is true, that if a power of disposal by will, annexed to an express estate for life, with a remainder, in case of intestacy, to the heirs of the first legatee, would amount to a gift of the whole fund, this will must so operate; for all these things the testatrix undoubtedly intended. But it has been already stated that the power does not enlarge the interest, and it is clear the heirs at law may take personally as purchasers, if the testatrix so intended. That she did so intend in this case, appears not merely from the express limitation for life, and the gift to the heirs in remainder, but from another clause, which necessarily depends altogether upon the heirs taking as purchasers by way of remainder. That clause is: "*Provided always*, that none but Anne Stewart Newton's maternal relations shall be recognized as heirs at law, or be considered as capable of taking under this will." I do not attach very great importance to the concluding words, though they indicate that the testatrix understood the heirs were to take under her will, and not by descent or the statute of distributions; but it is plain that the whole clause must be stricken out of the will, as inoperative, if the heirs do take by descent or from the ancestor, for, in that case, all

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who are by law entitled, must so take. To strike this clause out of the will, would be a far graver thing than to put on the words, "their interest in the estate," an interpretation which, though not consistent with their natural meaning, does no violence to what may be fairly considered the sense in which they were used.

What is said above applies also to the language of the codicil, upon which some reliance was placed, and it needs no further comment.

My opinion is, that the children and grandchild took only an equitable interest in the income of their respective shares during life.

As to the realty, the intent of the testatrix was the same as in respect to the personalty, and there is no rule of law to prevent the execution of that intent unless the rule in Shelly's case is applicable.

To decide this question, it is necessary first to determine what estates are devised by this will.

It is a settled rule, that trustees take and hold under a will just that quantity of interest necessary to enable them to discharge the duties of their trust. *Neilson v. Lagow*, 12 How. 98; *Webster v. Cooper*, 14 How. 499. To these trustees and their heirs, the real property is devised in trust,

1. To pay debts.
2. To divide the whole property, real and personal, into shares.
3. To pay the income of each share, after deducting the expenses, &c., to a child or grandchild for life.
4. By a clear implication, though it is not expressed, to hold to the use of the appointees by will of such child; and, in default of any appointment, to the use of its heirs at law.

From this view of the purposes of the trust, there can

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be no doubt that the legal estate in each child, during the life of that child, was in the trustees. See Mr. Jarman's note to 1 Pow. on Dev. 221. And it is equally clear, that independent of the power of sale in the trustees, which will presently be noticed, the appointees or heirs, as the case may be, would take a legal estate by way of executory devise. Nor is the power of sale in the trustees inconsistent with this; because, though the power implies that the trustees have a fee-simple vested in them, and may sell and convey one, and thus defeat the executory estates in the particular land sold, yet there is no difficulty in substituting one fee for another by way of executory devise, or in making this substitution depend upon such contingencies as are provided for in this will. So that though a fee-simple is actually given to, and is to be held by, the trustees, as long as the trust continues, if no sale be made, and though it is contingent whether appointees or heirs are to take, yet, where the trust is fully performed, and the contingency is determined, the appointees or the heirs will take at once a legal estate in fee-simple, as purchasers under the will, by way of executory devise, the limitations being in effect to Amory and Perkins in fee, provided that if they shall not have sold the land before the death of the child or grandchild, then it is to go to the appointees or heirs of that child or grandchild in fee. See 1 Pow. on Devises, 187. And it is not material whether this estate is taken by the appointees or heirs by way of a shifting or springing use, the fee being in the trustees to serve that use, or by way of executory devise by force of the statute of wills, for in either event it is a legal estate in fee-simple. It follows that the rule in *Shelly's* case is not applicable to this will; because the estate limited by it to the ancestor is an equitable estate for life, and the estate limited to the heir is a legal estate in fee. "It fre-

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quently happens," says Mr. Powell, (Pow. on Dev. 432,) "that a testator devises lands in trust for a person for life, and after his death for the heirs of his body, but gives the trustees some office in regard to the tenant for life, that causes them to retain the legal estate in respect of his interest, but which, being confined to the estate for life, does not prevent the limitation to the heirs of the body from being vested in them. In such cases, they take as purchasers." See the cases cited by him *in loco*, and in vol. 1, p. 221, n. *Playford v. Hoare*, 3 Younge & Jer. 175; 6 Greenl. Cruise, 312.

But there are other reasons why the rule in Shelly's case is not applicable to this will. If, as is mentioned by the complainants, the provision of the will, that none but Anne Stewart Newton's maternal relations shall be decreed heirs at law, so as to take under the will, applies not to the heirs of the granddaughter alone, but to the heirs of all the children, then the limitation is not to the heirs at law, but only to a particular class of heirs; and as the same persons are not to take, upon whom the law would cast the inheritance, the limitation is not within the rule in Shelly's case. *Webster v. Cooper*, 14 How. 488.

I do not mean to decide the question whether this is the true interpretation of the will, because parties not before the court may be interested in it, and I do not deem it essential to the case to decide it. But I take it as the interpretation asserted by the complainants themselves; and, if correct, it destroys this ground of their claim.

But independently of this, I am of opinion, that the statute of Massachusetts governs this case. That statute is as follows: "Where lands are given by deed or will to any person for life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such taker, and a

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remainder in fee-simple in his heirs." Rev. Stats. ch. 59, § 9.

Two reasons are assigned why this statute does not include this case. First, that a power of disposal by will is given to the ancestor. Second, that a power of sale is given to the trustees. But the mere existence of these powers does not prevent the limitation to the heirs from taking effect. Notwithstanding their existence, there is still a limitation to one person for life, and after his death, to his heirs in fee. If there were not, there would be no ground to maintain that the rule in *Shelly's* case was applicable; for the only reason why this case is said to be within that rule is, that the will gives the remainder in fee to the heirs of the ancestor to whom a life estate is given; and if so, the case is within the words of the statute. A power, given either to the tenant for life, or to a trustee, by the execution of which the remainder may be defeated, not being inconsistent with the application of the rule in *Shelly's* case, ought not to be held inconsistent with the application of the statute, which was designed to abolish that rule in the cases it describes. If the power is duly executed, it defeats the estates given to the heirs. But, as the rule in *Shelly's* case does not require that they should be indefeasible, so neither does the language, nor the apparent object of the statute, require that they should be indefeasible.

The purpose of the statute was to change the law, so that the real intent of testators should not be defeated by a technical rule, based on certain fixed principles, which have no place in our jurisprudence. The intention of this testatrix to have the ancestor take only an estate for life, and the heirs, after her death, take the fee, if no will or sale should be made, is as clear, and as justly entitled to be executed, as it would have been if no contingency

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existed. And as the words of the statute are satisfied, I can perceive no good reason why this case should not be governed by it.

My opinion is, that the children and grandchild took only an equitable interest for life in the realty.

It remains to consider the effect of that clause in the will which disposes of the portion of a child dying in the lifetime of the testatrix.

Reduced to those words only which are applicable to the event that happened, the decease of one of her sons, its language is as follows: "In case one of my sons should die before me, his heirs at law shall be entitled to the portion of income that would have come to him, had he survived me; and to the portion of the principal that would come to them in like manner."

I think the purpose and effect of this clause are, to put the heirs at law of a son, dying in the lifetime of the testatrix, in the place of the son, so far as respects the income of his portion, and at the same time, to give to them the right to the principal fund, which they would have had, if this son had survived the testatrix, and afterwards died intestate. So that, on the decease of the testatrix, the heirs at law of her son, John T. S. Sullivan, became entitled, not only to the income of one eighth part of the estate, but also to the capital of the personalty, and the fee of the realty. In other words, they have succeeded both to what would have been his rights and their own, had he survived the testatrix and died intestate. They have thus the entire beneficial interest in the property, and may call for a conveyance of it at pleasure. The will provides for the duration of the trust, as to each child's share, while that child lives. No other termination of the trust is fixed by the will. But this is manifestly inappli-

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cable to the case of a child dying before the testatrix ; in which case the heirs at law of such child, becoming entitled both to the income and principal, the trust is to continue no longer than those heirs may choose to require its execution. They do require it by this bill ; and it must be decreed, subject to the prior trust to pay the debts of the testatrix.

I am also of opinion, that the provision of the will, requiring the shares of the daughters and granddaughter to be held as their separate property, is not applicable to what they take under the will, as heirs at law of their brother. The language of the will points only to the shares set apart by the trustees, for their several use, during their respective lives, pursuant to the directions of the will ; and therefore, the married daughters and their husbands, and the unmarried daughter, and the two sons, are entitled to receive one eighth part of the estate ; but the Court, in pursuance of the usual rule which is administered when a husband comes into equity to recover property of his wife, must consider the married daughters entitled to a competent settlement out of this fund, unless satisfied by their separate examination, before a commissioner, that the right is voluntarily waived.

One direction in this will is, that after the payment of debts, the trustees shall divide the whole property into eight equal shares. This has not been done, for reasons stated in the answer of the trustees, and which seem to be sufficient to have thus far excused the performance of this duty. At any rate, no complaint is made that any loss or embarrassment has been thus far occasioned by its omission. But it is a plain direction of the will, in which not only the legatees for life, but those who may hereafter come into the executory estates, as appointees or heirs, are

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interested, that each one may bear the losses and receive the profits appropriate to the eighth part in which he or she is interested; and it is the duty of the Court, upon this bill, to see that this direction is obeyed.

UNITED STATES *vs.* AMARIAH MAYO.

Under what circumstances a person indicted for a misdemeanor, may plead by attorney.

MR. DODGE moved to be allowed to plead to the indictment, which was for beating a seaman, in the absence of the defendant. He produced a special power of attorney from the defendant to himself, authorizing him to plead and defend at the trial, in the absence of the defendant; and also an affidavit, showing that the defendant was master of a vessel, bound on a voyage and ready for sea, when he was arrested; and that if he were to remain till the trial, he would lose his voyage, and be subjected to much other inconvenience. The District Attorney consented to the motion, stating that it was a case of no aggravated character.

CURTIS, J. I have considered this motion with some care, as affecting the practice of the Court; and I have also conferred with the District Judge, who has had occasion, heretofore, to pass on similar questions. I will state the results at which we have arrived.

1. To save his recognizance, even in case of a misdemeanor, the defendant must appear personally.
2. He is liable to be called on his recognizance at any

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time, either on the motion of the District Attorney, or by the order of the Court, on its own motion, if it sees cause to direct it.

3. It is in the discretion of the Court, to allow one indicted for a misdemeanor to plead and defend, in his absence, by attorney. This discretion will be regulated by the following circumstances.

1. That it is not an offence for which imprisonment *must* be inflicted.

2. The Court must be satisfied, that the nature of the case, and its circumstances, are such that imprisonment *will not* be inflicted.

3. The District Attorney must consent, or it must appear to the Court that he unreasonably and improperly withholds his consent.

4. Sufficient cause must be shown, on affidavit, to account for the absence of the defendant.

5. A special power of attorney, to appear and plead and defend in his absence, must be executed by the defendant, and filed in Court by the attorney.

I have considered this case; and being of opinion that its facts bring it within these requirements, the attorney may be admitted to plead and defend.

ANDREW BARNETT, LIBELLANT, vs. DANIEL B. LUTHER.

The Admiralty will not entertain suits for merely nominal damages in cases of personal torts, not involving any subject-matter beyond such a claim for damages.

THIS was an appeal from the District Court by the libel-

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lant, in a cause of damage. The libellant was a seaman on board the bark *Mary R. Barney*, and alleged in his libel an assault by the master and mate of that vessel, for which he claimed damages. The facts appear in the opinion of the Court.

CURTIS, J. It appears, from the evidence in this case, that the libellant had been engaged in painting the mizzen-mast head, and when he came down to dinner, left the paint-pot so carelessly secured, that by the motion of the vessel the paint was thrown down on the house. The master ordered the man to be called from the fore-castle; and when he came on deck, the mate ordered him to go aloft and take his paint-pot down. The man went; but as he passed aft, he used insolent language towards the officers, who were all on deck. The master ordered him to be silent, and told him he would flog him if he did not obey; but he continued to grumble, as the witness expresses it, until he came down to the deck, and then he passed over to the weather side, where the master was standing, and stopped near him, looking at him, as the only witness who describes the occurrence says, with an insolent look. The master took the top-gallant brace, and struck him with the end of it over the shoulder; the man instantly seized the master, and they fell together on the deck. The man put his hand back, as if feeling for his sheath-knife; but he had left it below. The second mate then interfered; the master got up, the man rose to his feet, and immediately struck the second mate, who returned the blow; they seized each other, the second mate threw him down, and while down, struck him once or twice in the face. The man was then put in irons until the next morning, but not deprived of his food. The next day he was set at liberty.

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This case has been argued upon the ground that a technical assault by the master is made out by the evidence; and that, since the Act of Congress of September 28, 1850, (9 Stat. at Large, 515,) abolishing the punishment of flogging in the navy and in vessels of commerce, the master cannot justify his act of striking the seaman, even though his insolence deserved punishment. And it was stated by the counsel for the libellant, that this appeal had been brought here to try that question.

To determine what is the precise effect of this Act of Congress upon the authority of the master of a vessel to inflict punishment upon the crew, is a matter of no small difficulty, and of very great importance. It is a question which should be settled only after great consideration, when it shall become necessary to do so. This case does require it. For if it were admitted that in an action at law, this seaman could recover nominal damages for the blow inflicted by the master, it does not follow that the Admiralty will award him nominal damages. [A Court of Admiralty is a Court of Equity acting on marine affairs. As such, it regards and protects only substantial rights. Merely nominal claims, which do not amount to any substantial right, and are not so connected with any substantial right as to be necessary to its vindication, are not subjects of relief here.] It is true that a claim for nominal damages may be so connected with a substantial right, as to present the only means of trying and vindicating it. And in such a case, though the damages are nominal, the subject-matter of the suit may be important, and a fit subject of litigation. Cases in which, by acquiescence for a length of time, an adverse right may be gained, are of this description. And at the common law, the prevailing party having a legal right to costs, which is of itself a substantial right, it is necessary to decide claims to nominal

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damages upon strict legal principles, even where nothing but a question of costs is involved. But in the Admiralty the costs are in the discretion of the Court, and do not depend upon the question whether the libellant recovers one dollar or nothing.

In this case, the libellant was, throughout, in the wrong. He was negligent, in not properly securing the paint-pot. He was grossly in fault for his insolence to the master, and his disobedience of his order to be silent; and still more for confining the master, and striking the second officer. He amply deserved quite as much punishment as he received. And if, which I do not intend to decide, there was a departure by the master from the strict line of his authority, when he struck the libellant with a rope, the provocation was so great, the blow so slight, and the conduct of the libellant so insubordinate and violent, that he could in no event recover more than nominal damages. These, for the reasons already suggested, I do not feel bound to award to him.

The decree of the District Court is affirmed.

EDWARD W. CARRINGTON *vs.* JAMES H. STIMSON.

The Judiciary Act, section thirtieth, requires personal service on the adverse party, of the notice of taking a deposition; and service, by leaving a copy at his place of abode, is not sufficient.

THIS was an appeal by the libellant from a decree of the District Court, in a cause of personal damage. The facts and questions appear in the opinion of the Court.

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CURTIS, J. There is a preliminary question in this case, concerning the admissibility of the deposition of William A. Dahl.

The commissioner certifies, that "the adverse party was notified, as appears by the notice hereto appended, but was not present." The notice to the respondent is in the usual form, and the officer's return thereon states that he served the notice "by leaving a copy of the same on board the bark Weybopel, lying at Constitution wharf, in Boston, where I was informed the within-named Stimson lodged."

It was objected, that this was not proof of the notice required by law; and I am of that opinion. The deposition was taken under the thirtieth section of the Judiciary Act, (1 Stat. at Large, 88,) which contains the following proviso: "Provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of caption," &c. The authority to take depositions under this act, has always been construed strictly. *Bell v. Morrison*, 1 Peters, 351; *The Patapsco Ins. Co. v. Southgate*, 5 Peters, 604. It must appear that every requisite has been complied with. One requisite is service of a notice on the adverse party, or his attorney, if either be within one hundred miles. This must be construed to require personal service; no substituted service, by leaving the copy at his dwelling-house or usual place of abode, being authorized by the act. Consequently, the service in this case was insufficient to authorize the taking of the deposition. There is also another objection to this notice, not mentioned at the bar. The notice contains the names of two

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other persons, but not of the witness whose deposition was taken. I have, therefore, excluded this deposition.

The Court then examined the evidence; and upon the same principles stated in the case of *Barnett v. Luther*, affirmed the decree of the District Court.

ARTHUR WILKINSON *et al.* vs. PHILIP GREELY, JR.

A Collector who has compelled an importer to pay a higher rate of duty than that imposed by law on such articles as are named in the invoice, has the burden of proof to show the authority under which such higher duty was exacted.

When the question is, whether samples bore a particular name in commercial transactions, it is necessary they should have been so known generally, and not in particular places, to the exclusion of others, or to particular persons only.

On this question, negative evidence, from those engaged in the trade, has much weight.

If articles identical with the samples were not generally known, the question whether the diversities were material arises; and this may be a question of law when the facts are ascertained. A change, which renders an article substantially different as an article of commerce, and adapts it to all the uses of another article, on which a higher rate of duty is levied, destroys its legal identity, and is a material change under the revenue law.

THIS was an action for money had and received, to recover an alleged excess of duties exacted by the defendant, while Collector of the Customs for the Port of Boston. A new trial was granted in this case, which is reported *supra*, page 63. On this trial it appeared, that before the Tariff Act of 1846, various kinds of blankets were imported into the United States, among which was Mackinaw blankets, under which name the merchandise in question was invoiced, and entered by the plaintiffs at the cus-

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tom-house in Boston, in August, 1849. The Collector refused to allow them to pass under the designation of blankets, and assessed upon them an *ad valorem* duty of thirty per centum as manufactures of wool. Some testimony was introduced, tending to show that articles in all respects like these had been imported into New York, and known there as blankets before the date of the Tariff Act of 1846. There was also other evidence tending to prove that Mackinaw blankets, before that time, bore a stripe at the ends, and that after 1846 it was left off, as was the case with these goods, in order that they might be used for making garments with less waste of cloth. And there was evidence, that, so far as respected the fabric, and the processes of manufacture, these goods were substantially like certain species of coatings imported in pieces of twenty yards and upwards, under the names of Duffels, Petershams, and Pilots, known in commerce by those names, and entered at the custom-house as manufactures of wool. And there was evidence to the contrary on each of these points. Witnesses, skilled in the trade, were called on both sides, some of whom testified that goods like these, with some differences, were, and some that they were not, known in commerce as blankets, before the Tariff Act of 1846.

The jury were instructed as follows.

CURTIS, J. The Tariff Act of 1846 imposes a duty of thirty per centum, *ad valorem*, upon manufactures of wool, or of which wool is the component material of chief value, not otherwise provided for. These cloths are unquestionably manufactures of wool. They are, therefore, liable to pay thirty per centum, unless they are otherwise provided for. They are not otherwise provided for, unless they come under that clause of the act which levies a duty of twenty per centum upon blankets of all kinds. The question for

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you to try is, whether the articles, samples of which are before you, come under that last-mentioned clause of the act. In considering this question, you must bear in mind that the burden of proof is upon the defendant. Acting in behalf of the government, he has levied upon these commodities a duty of thirty per centum. He has compelled the plaintiffs to pay it. When any officer of the government compels a citizen to pay a tax, he may be required to show that it was exacted by authority of law. The defendant must prove this here; and he can do so, only by satisfying you that these articles were not blankets, within the meaning of the Tariff Act of 1846.

Usually, it is for the Court alone, to ascertain and declare the meaning and effect of an Act of Congress. But laws levying duties upon particular articles are, to some extent, an exception from this rule. The reason is, that Congress is understood to have designated the various commodities subjected to duty, by the names by which they are generally known in commerce; and when a question arises, whether a particular article is embraced under some particular name in such a law, the first inquiry is, whether such articles were generally known in commerce by that name, when the law was passed. This inquiry can be made only by the jury, and, therefore, it is that your aid is necessary to determine whether these articles, now in question, are, or are not, included in this Act of 1846, under the words, "blankets of all kinds." In approaching the inquiry you are to make, there are several matters which, though preliminary to the main question, are nevertheless important.

It is generally agreed by the witnesses, that the term •blankets is a generic term, which includes a considerable number of different kinds of blankets. That in commercial dealings, there is no such thing bought or sold or known as blankets merely. But always some particular

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kind of blankets, as Mackinaw, or Rose, or Whitney, or Duffel blankets. And you observe that the Act of Congress does not speak of blankets, or blanketing, but of "blankets of all kinds." Now, the plaintiffs have imported and entered these fabrics under the name of Mackinaw blankets. You will consider then, whether the inquiry is not narrowed down to the question whether these were Mackinaw blankets. This may be quite material. For, if that be the true inquiry, you need not trouble yourselves about the characteristics of other species of blankets. You will readily perceive, that if it were competent for the foreign manufacturer to select from each kind of blankets such characteristics as he might wish, the fine wool from one, the close beating from another, the shearing from a third, the milling from a fourth, and the absence of the stripes from a fifth, he might produce a fabric which had no one quality not common to some kind of blankets, yet, as a whole, totally unlike any of them. And, therefore, it is important to bear in mind, that you are to ascertain whether such articles as these were known as *any kind* of blankets in 1846; especially, whether they were known as Mackinaw blankets. And it is not enough that they were so known in some one place, to the exclusion of others, or to some particular importers. They must have been so known generally to those engaged in the trade. The necessity for this is apparent. For if these cases were to be decided according to the designation of articles in particular places, or among some particular persons, the decisions must vary, and the application of the law, instead of being uniform throughout the whole country, would be irregular, unequal, and unjust. It is particularly important, therefore, that you should bear in mind, that when it is said that the question is whether these articles were known in commerce as some kind of blankets, it is meant, were

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they generally so known throughout the United States to persons engaged in the trade. At the same time, if they appear to have been generally so known in New York and Boston, from which ports alone the evidence in this case comes, it is fair to infer, in the absence of all evidence to the contrary, that they were generally so known throughout the country. In this connection, there is another observation which I deem important. The plaintiff's counsel has suggested that the witnesses for the defendant speak negatively only. That they can say no more than that such articles as the plaintiff's were not known to them under the name of blankets of any kind, before 1846; and that positive evidence is to be believed rather than negative. This is generally true. But this case is peculiar. Where the inquiry is, whether a certain act was done, or a certain event happened, positive evidence from a credible witness that he saw or did it, is, generally, to be preferred to negative evidence, from a witness equally credible, that he did not see it, though present; because both may intend to speak the truth. The act or event, though it occurred, may not have been observed or remembered by him who speaks negatively. But here the question is, whether a certain thing was generally known to those engaged in a particular trade; and when witnesses so engaged testify it was not known to them, this negative testimony tends directly to disprove the fact asserted, and if the witnesses are quite numerous, and their business extensive, their testimony would, if believed, be sufficient to prove, though the plaintiff's witnesses are believed when they testify they knew the fact, yet that the fact was not generally known, for if generally known, it would have been known to the defendant's witnesses as well as to the plaintiff's.

Passing from these preliminary observations, I think there are three inquiries to be made by you.

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1. Whether articles, in all particulars like these samples of the plaintiffs, were generally known as Mackinaw blankets, before July, 1846? If not, then 2. Were articles, more or less similar to these, known as such blankets, and what are the diversities between these samples, and the articles so known as blankets? And 3. Are those diversities material, so as to render the designation of blankets inapplicable to these samples?

There is some evidence from New York, tending to show that articles in all particulars identical with these samples, were known as Mackinaw blankets before July, 1846. [Here the Judge detailed this evidence.] If this satisfies you that articles identical with the samples, were generally known as Mackinaw blankets, before July, 1846, you need inquire no further. The plaintiff, in that event, is entitled to your verdict.

But if you think otherwise, you will then compare the samples with what were generally known as Mackinaw blankets before July, 1846, and ascertain the diversities between them. [Here the Judge recapitulated the evidence on this subject.]

Having ascertained, to your own satisfaction, what these diversities, if any, are, you are next to inquire whether they are material. In other words, if articles in all particulars like these samples were not generally known in commerce before 1846, are the differences between these samples and what was known as Mackinaw blankets, so material, that these samples, as articles of commerce, differ substantially from what were known as Mackinaw blankets? You have had, from many of the witnesses, opinions upon this question. Some witnesses consider the supposed differences material, and others immaterial. It commonly happens, that when witnesses are allowed to give opinions, they disagree. And though this kind of evidence is admissible in

some cases, and should, in proper cases, be considered by the jury, yet whenever the jury have the facts before them, and the matter is one concerning which they feel able to form their own opinions, it is safer and more satisfactory to do so, than to trust to the opinions of witnesses, which are often formed without an exact knowledge of the precise question on which their opinion is required, and often differ, because they understand differently the very terms they themselves employ.

It is asserted by the defendant, that these samples are substantially like some species of coatings, imported before 1846, and known in commerce as Flushings, Pilots, and Petershams. And it is urged, that though they came in pieces of twenty yards and upwards, and these are in lengths of four yards only, this difference is not sufficient to exempt these from paying a duty of thirty per centum. And it is further urged, that the stripe, said to have been borne on Mackinaw blankets, before 1846, has been omitted from these samples to adapt them more perfectly to be used as coatings. On the other side those positions are denied, and it is said the stripe was merely an ornament, and that the taste of customers having changed, it has been left off, but that such a change does not affect the essential character of the thing.

I am not prepared to say, that because you may be of opinion that the fabric of these samples is substantially like coatings, therefore they are necessarily not to be deemed blankets; for the case is not to be determined simply by an examination of the fabric. For aught I know, the fabric of some kinds of coatings may have been like the fabric of Mackinaw blankets. Yet, undoubtedly, any difference between the fabric of these samples, and of things known as Mackinaw blankets before July, 1846, are important for your consideration; and if those differences

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assimilate these articles to coatings, they become still more important. Neither can I say, that the omission of the stripe, though designed for an ornament, is immaterial. That is for you to determine.

It is urged also, that the use of these fabrics for garments, does not change their character or designation. This is true. But in considering whether any differences between these samples is material, the practical effects of these differences is not to be overlooked. Though a blanket be used to make a garment, it is, nevertheless, till cut up, a blanket. But it does not follow, that a fabric somewhat like a blanket, but made different from one, in order to adapt it better to be made into a garment, is also a blanket. The objects of the change, as well as its nature, should be considered.

And upon this part of the case, my instruction to you is, that if you find articles identical with these samples were not known in commerce before July, 1846, but articles similar to these, with the exception that they bore a stripe or heading had been generally known as blankets, had been used for making coats, and, to the extent they were so used, took the place of manufactures of wool, on which was paid a higher duty than on blankets, and if you further find that the omission of the stripe, taken in connection with any other differences which you may find, does make a substantial change in the article, as an article of commerce, by adapting it more perfectly to be used for making garments, thus adapting it more perfectly to the uses of those fabrics, which, under this law, are denominated manufactures of wool; and if you further find, that before the Tariff Act of 1846, fabrics, substantially like these samples, without a stripe, had been imported into the United States in pieces of about twenty yards and upwards, and entered at the custom-house, and known in commerce, not as blankets, but as manufactures of wool, then the absence of the stripe

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makes a material change in the article, and it is not one kind of blanket, and is not provided for otherwise than as a manufacture of wool, in the Tariff Act of 1846. The judge then recapitulated and explained this instruction.

The jury returned a verdict for the defendant.

Choate and *Griswold*, for the plaintiffs.

Hallett, District Attorney, for the defendant.

After verdict, the plaintiffs moved for a new trial, assigning as the cause, that the last paragraph of the above instructions, beginning with the words, "and upon this part of the case," was erroneous.

This motion was argued by *Choate* and *Griswold*, for the plaintiffs; and *Hallett*, District Attorney, for the defendant.

CURTIS, J. To judge of the correctness of that part of the instructions to the jury, of which the plaintiffs complain, it is necessary to observe to what particular point it related, and what facts it assumed to have been found by the jury, before it would be applicable to the case. The jury had previously been instructed that, if articles, identical with the plaintiffs' samples, had been generally known in commerce, under the designation of blankets, before the passage of the Tariff Act of 1846, they need inquire no further, but should return a verdict for the plaintiffs. But if they should not so find, they must then inquire what were the diversities between the plaintiffs' samples and articles, so known as blankets; and whether those diversities were material. And the instruction, which forms the ground of this motion, related solely to this question of the materiality of these differences.

It appears, not only from its connection, and by what had previously been said, but in express terms, that the jury

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have found that articles identical with the plaintiffs' samples were not generally known in commerce, as blankets, before 1846; that one diversity was the absence of the stripe or heading; that the fabric of the samples was substantially like cloths imported in pieces of twenty yards and upwards, and generally known in commerce, before 1846, not as blankets, but as manufactures of wool; and that the omission of the stripe, taken in connection with any other differences the jury might find, *did make a substantial change in the article, as an article of commerce.* And the instruction is, that if the jury should find these facts, then, although witnesses had given their opinion that the omission of the stripe was immaterial, yet it was in point of law material; and these samples were not to be deemed blankets within the meaning of the Tariff Act of 1846.

I do not think the plaintiffs can complain of this instruction. To see precisely what its effect was, it is necessary to observe that the question was, whether these samples, if imported before the Tariff Act of 1846, would have been generally known in commerce as blankets. Now, suppose this question had been presented on a statement of those facts which the jury are taken to have found. The first difficulty to be encountered by the plaintiffs would have been, that these samples, if imported before 1846, would not have been generally known at all, by any name. They would have been a novelty. But still, it would be urged, they are so like blankets, that they may come under that designation. But if they are substantially like coatings in their fabric, and if they are substantially different from blankets, as articles of commerce, how can they be denominated blankets? Why should they not be deemed to be included by the law under that description of fabrics which they substantially resemble; and why should they

be included in the name of blankets, from which they substantially differ?

I think some obscurity has been thrown over the case by the assumption that the jury were instructed that, if the omission of the stripe facilitated the making into garments, then it was material. But this is not the effect, any more than the terms of the instruction; which was, that it was material, under the condition stated, if it worked a substantial change in the thing as an article of commerce. It is true the attention of the jury was drawn to the effect of this change, by which, as the evidence strongly tended to prove, the thing was better adapted to the uses of coatings; but this was done in such a manner as to restrict, rather than enlarge, the field of inquiry, when the jury were considering whether the omission of the stripe made a substantial change in the article, as an article of commerce; and so was favorable to the plaintiffs.

The instruction was: "If they should find that the omission of the stripe, taken in connection with any other differences which they might find, made a substantial change in the article, as an article of commerce, by adapting it more perfectly to be used for the making of garments, and to the uses of those fabrics which, under this law, are denominated manufactures of wool," &c. Now, it would, in my opinion, have been correct, to leave them to find whether the change was substantial, for any cause; but as the evidence pointed strongly to this cause, and to no other, I thought the instruction should draw their attention to it, to the exclusion of all others; and this was the reason why it was thus mentioned.

It is urged by the plaintiffs' counsel, that in all other cases in the books, the question has been left broadly to the jury, whether the articles bore a certain commercial designation. This is generally true; but so this case was

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left to the jury. It was only in the event that they should come to the conclusion there were diversities between these samples and what were known as blankets, and it should thus be necessary for the jury to decide whether these diversities were material, that the instruction was to be applied. It is further urged, that this question of the materiality of these diversities should have been decided by the jury, upon the opinions of experts. I think otherwise. I believe the experience of all concerned in the administration of justice tends to the conclusion that this species of evidence is less satisfactory than any other; and it is a common remark, that where there is any room for a difference of opinion, experts, in about equal numbers, will generally be found testifying on each side. To make revenue cases necessarily and always depend on such evidence, would greatly increase the uncertainty of their results, and strongly tend to render the application of the revenue laws variable, unequal, and consequently unjust. It may not be practicable always to avoid dependence on such evidence, in this class of cases; but it is not easy to see how it had any proper place in this case. Experts are usually called in revenue cases, to say that they have or have not known articles, samples of which are shown, under a particular denomination. This is a mere matter of fact. True, it involves a mental comparison between the samples and the articles previously known. But so does every question of identity. The same comparison is made when a witness swears to a prisoner, or an article stolen from him. But when it is ascertained that there are diversities between the samples and all things previously known, why should a witness be allowed to give an opinion that the diversities are not material. He has had no experience, and can have no particular skill upon this question; for the diversities are admitted to be novel, and

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he cannot have positive knowledge what effect may be attributed to them.

Besides, the real question is, what effect is attributed to them by the revenue law? Suppose any number of witnesses should swear that the difference between a coat embroidered with gold lace, and one not thus embroidered, was not material, or that plaster of Paris, ground, was not materially different from the same article unground, — such testimony could have no effect, because the law makes these differences material. And the true question, under this motion for a new trial, is, whether a diversity between these samples and blankets, which differs them, substantially, as articles of commerce, from blankets, and adapts them to the uses of coatings, which are subject to a higher rate of duty than blankets, and leaves no substantial difference between the samples and coatings, except that the former come in pieces of four yards, and the latter in pieces of twenty yards, is or is not a material diversity between the samples and blankets, under the revenue laws. And my opinion is, that it is, in point of law, a material diversity.

To hold otherwise, would leave the revenue law open to evasions, which I do not think should be permitted. If the mode of manufacturing an article, which is named in the revenue law and subjected to a duty of twenty per cent., is so changed as to make it substantially a different thing, viewed as a commodity of commerce, and the purpose and effect of that change are to adapt the article to take the place and serve all the uses of another article, on which a higher rate of duty is imposed by law, I am prepared to say, that, in point of law, the article, thus changed, is not entitled to be admitted under the name appropriated in the law to articles not thus changed. In my opinion, its legal identity is destroyed.

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I have not overlooked the argument, that if it was intended to be asserted that these samples were substantially coatings, that question should have been left to the jury; and that, under the instruction, the jury cannot be taken to have found they were known as coatings, but only that, so far as respects their fabric, they were substantially like what were known as coatings. It is true this is all the jury have found on this point. But I do not consider the true question was whether these samples were known as coatings, but whether they were known as blankets. They may differ, substantially, from both; and then, being a manufacture of wool, and not otherwise provided for as blankets, they were liable to a duty of thirty per centum.

The motion for a new trial must be overruled, and judgment rendered on the verdict.

EDWARD PATCH, APPELLANT, *vs.* JAMES MARSHALL, LIBELLANT.

This Court will not decline jurisdiction of an appeal, in a case of personal damage, brought by an American seaman, serving on board a British vessel, when the voyage was terminated here, and the master was domiciled in the United States.

Though the Court will not call in question the official acts of a British Consul, in a foreign port, respecting the crew of a British vessel, it does not follow that it will not investigate the conduct of the master, in procuring the intervention of the Consul, by which the seaman was imprisoned; if that amounts to a tort, so as to render the master liable for the imprisonment, it stands on the same ground as other torts.

THIS was an appeal from a decree of the District Court,

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in a cause of personal damage. The case is stated in the opinion of the Court.

CURTIS, J. The District Court having made a decree in favor of the libellant, and awarded to him damages, in the sum of four hundred dollars, together with his costs, the respondent appealed to this Court, and entered his appeal at the present term. Some days afterwards, the Consul of Her Britannic Majesty at the Port of Boston, filed a protest against the jurisdiction of this Court, assigning for causes, in substance, —

1. That the brig Hope, on board which the libellant and respondent sailed, was a British vessel; and the respondent, her commander, a British subject.

2. That an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government.

This objection to the jurisdiction must be first disposed of. The facts upon which its validity depends are, that the brig Hope was a registered vessel of Great Britain, and the master a British subject; that the voyage in question was made for account of merchants domiciled in Boston, who hired the master on wages, and provisioned and manned the vessel; but whether under a charter-party, or by reason of their ownership of the brig, does not appear.

The voyage, described in the shipping articles, signed by the libellant, is from the port of Boston to St. Jago de Cuba, and back to a port in the United States. The voyage actually performed was terminated in Boston, in July last; and the crew, including the libellant, were then and there discharged. The libellant was born in the United

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States, and is described in the articles as of Baltimore, in the State of Maryland. There is evidence tending to show that the libellant was not aware the brig was not a vessel of the United States, until after she sailed from Boston. The family of the master has, for a considerable time, resided in the neighborhood of Boston; and it did not appear that he has any other domicile.

Upon these facts, I am of opinion this protest must be overruled.

It is not easy to perceive how it can be allowed, without impairing the rights of the respondent himself. It must be remembered that he is the appellant. The protest is, therefore, an objection against entertaining his appeal. But if not entertained, what is to be done? If the appeal should be dismissed, upon the ground that this Court would not exercise its jurisdiction in the case, the decree of the District Court would stand unreversed; and upon a certificate from this Court, that the appeal had been so dismissed, the District Court might find itself obliged to execute its decree; because the decision would not be that the District Court had not jurisdiction, or under the circumstances did not properly exercise it, no objection thereto being there made; but only, that after a protest by the Consul, this Court would not entertain the appeal.

If, however, this difficulty were overcome, I should not see sufficient ground upon which I could decline to exercise jurisdiction. It is evident there must be a failure of justice, if I were to do so. The claim is *in personam*. The actual domicile of the master is here. The voyage was ended at this port. The libellant is a native of the United States, and here has his home. To require him to follow this master over the world, until he can find him in

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a British port, would practically deprive him of all remedy. I do not think any considerations of public convenience, or the comity extended by the Courts of Admiralty of one country to those of another, have any applicability to such a case. I do not consider it necessary to review the decisions in England and this country, on the subject of the exercise of the admiralty jurisdiction over foreigners. None of them apply to a case where the claim is for a personal tort, and the libellant is not a foreigner, and the respondent, though an alien, is domiciled here, and the voyage was begun and terminated in the United States.

It is true this Court should not call in question a British Consul, for his official acts respecting the crew of a British vessel in a foreign port. It is correctly stated in the protest, that he is responsible solely to his own government; or if to individuals, such responsibility grows out of the municipal laws of his country, which this Court would not undertake to administer.

But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the Consul, upon false allegations, to the injury of an American citizen by imprisonment in a foreign jail, is not to be here investigated. That depends on other considerations, and is not distinguishable from any other wrong done by the master, of which this Court should take or refuse jurisdiction according to the national character and domicile of the parties, and the place of termination of the voyage. *The Courtney*, Edw. 239; *The Calypso*, 2 Hag. 209; *The Salacia*, 2 Hag. 262; *The Madonna*, 1 Dods. 37; *The Two Friends*, 1 Rob. 271; *The Johann Friederich*, 1 Wm. Rob. 38; *The Bee*, Ware's R. 332; *The Jerusalem*, 2 Gal. R. 191.

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The protest, therefore, must be overruled.

The Court then examined the evidence, and affirmed the decree of the District Court.

Wheelock, for the appellant.

Sawyer, for the appellee.

Hillard, in support of the protest.

CIRCUIT COURT OF THE UNITED STATES
FOR THE FIRST CIRCUIT.

RHODE ISLAND DISTRICT, NOVEMBER TERM, 1853.

BEFORE { Hon. BENJAMIN R. CURTIS, Associate Justice of the Su-
preme Court.
Hon. JOHN PITMAN, District Judge.

GEORGE MATHEWSON *vs.* WILLIAM SPRAGUE *et al.*

A statute guardian cannot represent his ward in court, in a matter where his interest is opposed to that of the ward, except by force of some statute authority, or by an appointment by the court; and no court would appoint such a guardian *ad litem*.

The Court of Probate has only a special and limited jurisdiction, and must act in the manner prescribed by statute; otherwise its acts are void. If it make a decree without notice, when the statute requires notice, a party entitled to notice may treat its decree as void.

The 10th section of Act of Rhode Island of 1822, so far as it respects the service of notice to wards on their guardians, is repealed.

In Rhode Island the Probate Court has exclusive jurisdiction of the probates of wills of lands.

THIS was an action of ejectment to recover an undivided part of four lots of land, situate in Cranston and Johnston.

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The plaintiff proved that William Sprague died seised of the lands, on the 27th of March, 1834, and it was admitted that he left three children, William, Amasa, and Almira, and that the plaintiff was one of four children of his daughter Susanna, who died in the lifetime of her father. The plaintiff, together with one sister and two brothers, were all minors, at the decease of their grandfather, and Amasa Sprague was their statute guardian.

The defendants claimed under the will of William Sprague, and offered to put it in evidence. The plaintiff objected, because it had not been duly proved and allowed by the Court of Probate. On examining the will and its probate, it appeared, that William and Amasa Sprague, the testator's two sons, were executors and residuary devisees and legatees, and that far the larger part of the testator's property, including his lands, was devised and bequeathed to them. And on the production of the decree of the Probate Court, it also appeared that the will was presented by the executors for probate three days after the testator's death, and that the Court dispensed with notice, by reason of the written consent of all parties known to the court to be interested, and residing within the State, that consent being given for the plaintiff and his sister and brothers by Amasa Sprague, their guardian.

CURTIS, J. The questions are, whether the probate of this will is defective, and if so, whether that defect renders the decree void, or only voidable by some appropriate proceeding to be had in that matter, by appeal or otherwise, as provided by law.

To enable a statute guardian to bind his ward by a proceeding in a court of justice, some statute authority must be found for his act. The statutes of the several States on this general subject are not uniform, but I am not aware

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that any where the statute guardian is made, generally, competent to represent his ward in legal proceedings. The general rule certainly is, that a guardian *ad litem* is to be appointed for that purpose. 1 Johns. 509, 10 Johns. 486, 8 Cowen, 365, 3 Chitty's Gen. Pr. 288. And this rule extends to Probate Courts. *Hart v. Gray*, 3 Sumn. 339. It is very clear that no court would appoint the statute guardian, guardian *ad litem*, if his interest were directly opposed to that of the ward. *Parker v. Lincoln*, 12 Mass. 16; *Noyes v. Barber*, 4 N. H. Rep. 406.

The defendants' counsel do not assert that Amasa Sprague, who was one of the residuary legatees and devisees under the will, and, therefore, strongly interested to procure its probate, could, as statute guardian, represent and bind his wards, in that proceeding, unless some authority to do so can be found in the statute law of Rhode Island; but they urge that such authority is found in an act passed in 1822, and found in the Digest of 1822, page 214.

The 10th section of this act was as follows: "That previous to the rendering of any order or decree in any matter before them, the said Court of Probate shall give to all known parties interested, living within the State, at least three days' notice, that they may be heard thereon; which notice shall be served by the town-sergeant, or constable, or the sheriff or his deputy, by reading the same to the party, if found, or otherwise by leaving an attested copy at the last and usual place of abode of such party; and when infants or wards are interested, notice aforesaid shall be served on their respective guardians; or such court may give notice, as aforesaid, to all parties, by advertisement printed three successive weeks in some newspaper printed within this State." And the section then proceeds to declare the

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effects of an appeal upon the different kinds of decrees made by Probate Courts.

The first section of the Act of January 20, 1824, (Pub. Laws of R. I. 578,) repeals so much of the tenth section of the said act as provides for the manner of giving notice. The second section requires, that previous to the rendering of any order or decree in any matter before them, the Court of Probate shall cause all parties known to them to be interested, living within the State, to have notice. It then prescribes different modes of giving notice, and then provides that if all such parties shall have given their consent in writing, the court may proceed without notice.

It is argued that the clause in this tenth section, respecting the service of notice on guardians, is not repealed; and that if, by law, notice was to be served on the guardian, it was competent for him to consent to proceed without notice.

I do not know that this necessarily follows, especially in a case like the present. It can hardly be supposed the law intended that a guardian, interested against his ward, would represent him in court; it must have expected that the effect of a notice to his ward, served on him, would be, that he would take care that his ward was properly represented in court by another; and not that he would consent to have the court proceed *instantly*, without actual notice to the ward, and without such fit representation being provided for by the ward, or his friends, or the Court. And it does not seem to me that an authority to take a legal notice, of a length prescribed by law, for the ward, necessarily, and in all cases implies an authority to shorten the time and agree to a proceeding *instantly*.

But it is not necessary to rest upon this; for I think this clause in the tenth section is repealed.

The repeal is, of so much of the tenth section, as provides for *the manner of giving notice*. This is not a repeal of the whole section; but besides the first part of the section which relates to notices, there is another part which relates to the effect of an appeal. This satisfies the restrictive words, "so much," &c.; and though it is only what relates to the manner of giving notice which is repealed, yet the clause in question, which provides a manner of giving notice to wards by serving on their guardians, is clearly within the description of the part repealed.

My opinion is, that this guardian was not empowered by any statute to consent in writing for his ward, and consequently, that the proceeding was irregular. And I think it very clear, that this irregularity was of such a nature as to render the decree utterly void, as against this plaintiff.

A Court of Probate has only a special and limited jurisdiction. And being expressly required by statute, before making any decree, to cause those interested to have notice, if it proceeds to make a decree without complying with this requisition of law, any party entitled to notice, may treat such a decree as void; and this upon several grounds.

1. Because the Court has not jurisdiction to determine the rights of such parties. This was held by the Supreme Court, in *Harris v. Hardiman*, 14 How. 344, in respect to a court of common law, which had rendered a judgment by default, without notice. And in numerous cases the same law has been applied to Courts of Probate. 11 Mass. 507; 5 Pick. 343; 18 Pick. 115; 3 Cush. 352; 3 Sum. 339.

2. This court being of a special and limited jurisdiction can do no binding act which is prohibited by statute, and it is prohibited to make a decree without notice. 2 Mass. 120; 7 Mass. 70; 4 Mass. 117; 11 Mass. 513, 514, and the cases there cited.

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3. The plaintiff could not appeal, for he had no notice of the decree; and no writ of error will lie; whenever a person interested, cannot have remedy according to law, by writ of error or appeal, he may avoid the judgment or decree by plea and proof; that is, whenever it is set up to affect his rights, he may aver its nullity. 11 Mass. 513, and cases there cited; 17 Mass. 91; 2 Met. 138.

It has been argued, that though this may be so in cases affecting the person, these principles are not applicable to a decree of probate of a will. That this was a proceeding *in rem*; and when the will was filed the Court obtained jurisdiction, and its decision that the guardian could consent for the ward, though it may have been erroneous, was an error occurring in the exercise of its jurisdiction.

It is true, the proceeding is, in some sense, *in rem*; but so was the proceeding in 11 Mass. 507, where this subject was very carefully considered, and in 4 Mass. 117, and 7 Mass. 70, and 17 Mass. 91. These were decrees of partitions, which were strictly *in rem*. And there is no sound reason for any distinction between decrees *in rem* and *in personam*. In *The Mary*, 9 Cranch, 126, 142, 144, the Supreme Court, speaking of proceedings *in rem*, say: "Notice of the controversy is necessary in order to become a party; and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, express, or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem* notice is served on the thing itself."

In *Bradstreet v. The Neptune Ins. Co.*, 3 Sum. 608, Mr. Justice Story held such a proceeding void, for want of notice of specific allegations; and he uses this language: "I hold, therefore, that if it does not appear upon the face of the record of the proceedings *in rem*, that some specific

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offence is charged, for which the forfeiture *in rem* is sought, and that due notice of the proceedings has been given, &c., it is not a judicial sentence, &c." Yet, in that case, the vessel proceeded against was within the jurisdiction of the court. The case in 4 N. H. R. 406, is also directly in point. Nor can it be maintained that this error occurred in the exercise of jurisdiction. It is true, the Probate Court, on the receipt of the will, has jurisdiction for the purpose of placing and retaining the will on its files, and issuing the proper notices to the parties in interest, and causing witnesses to be summoned and sworn, and taking all steps preliminary to a hearing; but it has not jurisdiction to make a decree, until all parties, entitled by law to notice, have been duly notified; and if it proceed to make a decree without notice, it acts without authority, and its decree is void. It is of no importance, that it decided that notice was not necessary in the particular case, because the guardian had consented for the ward. If notice was necessary, by law, the Court had no power to dispense with it, and whether it thought the dispensing power existed, or what were its reasons for thinking so, are immaterial.

The result is, that this will has not been proved.

After this decision had been given, the defendants' counsel offered to prove the will in this action; but the Court ruled, that the only tribunal competent to receive the evidence, and pass on the probate of the will, was the Court of Probate; that the decree of that Court, admitting or refusing probate, is conclusive, both as respects lands and personalty, and its jurisdiction over the question of probate is exclusive.

The defendants' counsel then moved for a continuance to enable the defendants regularly to offer the will for probate to the proper court, and it was granted; the Court being satisfied that the defect in the proceedings was not

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occasioned by any fraud, but was merely a mistake, which the defendants ought to have opportunity to correct.

Carpenter and Ames, for the plaintiff.

Greene and Robinson, for the defendants.

NORRIS *et al.* vs. GEORGE L. COOK *et al.*

If a consignee writes a letter to his consignor, and fully informs him what he has done, the silence of the consignee, after a reasonable time, is an approval of his conduct.

Though the consignee in such a case must have plainly disclosed a departure from instructions, and the reasons which induced him to depart from them, he is not bound to detail facts of a general nature, which he may reasonably presume the consignor has knowledge of.

If the jury send a written request for instructions to the Court, when not in session, the Court, after notice to the counsel, will reply in writing, if it deems it safe and proper to do so.

THIS was an action of assumpsit, to recover of the defendants the proceeds of the sales of a vessel and part of a cargo of lumber, consigned by the plaintiffs, who were merchants at Bristol, Rhode Island, to the defendants who were merchants at San Francisco, California, and also to recover the amount which ought to have been received from the sale of the residue of the cargo, which was consumed by fire, on shore, at the last mentioned place.

The plaintiffs alleged that their orders to the defendants were to sell the vessel and cargo immediately, on their arrival; and that though there was no breach of orders as to the vessel, the cargo was landed and stored contrary to orders, a part sold afterwards, for a less price than could have been obtained on arrival, and the residue burnt in one of the conflagrations by which San Francisco had been

visited. The defence was, that there was no breach of orders, or if there was any departure from instructions, it was known to the plaintiffs, and acquiesced in by them. After the jury had been fully instructed by the Court, they retired to deliberate on their verdict, and the court adjourned till the next morning. In the course of the evening, the presiding Judge received from the jury the following communication in writing :

“ The jury are not able to agree ; and wish you to give us information on the grounds named below, viz. Is it the duty of the consignor to inform the consignee that he approves or disapproves of his doings, or is his silence evidence of his acquiescence, generally.”

On the receipt of this communication, the Judge sent for the counsel on both sides, and made known to them, at his chambers, the above request of the jury, and read to them the following answer, which he proposed to send to the jury :

“ If the consignee writes a letter to the consignor, and fully informs him what he has done, and the consignor intends to disapprove of his conduct, he is bound to inform the consignee, within a reasonable time, that his conduct is not approved ; and if he is silent, his silence is an approval of the conduct of the consignee. This is a rule of law, and is applicable to all such cases.”

The jury afterwards returned a verdict for the defendants, and the plaintiffs moved for a new trial, assigning for cause that the above instruction was not correct.

The motion was argued by *Greene* and *Blake* for the plaintiffs, and by *Carpenter* and *Bradley* for the defendants.

CURTIS, J. It is in accordance with the practice of this court, when a jury address a written inquiry to the court, while not in session, to summon the counsel, and make

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known to them the inquiry, and then proceed to answer it in writing, if the Court thinks it safe and proper to do so; and no exception is taken to this course now. The objection is, that the instruction was not correct, because not sufficiently qualified. The argument is, that ratification is not binding, unless made with a full knowledge of all the material facts; and that the Court ought to have required that the plaintiffs should be informed, not only of what the consignees had done, but of all the circumstances necessary to enable the consignors to make up their mind, understandingly. And, that in this case, the consignors ought so have been told, not only that the consignees were about to land the cargo, but that the expenses of landing and storing a cargo there were unusually great, when compared with those charges at other ports; also, that timber was declining in price at the time it was landed, and how long the consignees intended to keep it on hand, and that the fire risks in that city were unusually great.

The instruction given in this, as in all other cases, must be considered with reference to the facts of the case.

The consignment was made by letter, bearing date Feb. 11, 1850; which was received and replied to by the defendants, April 17, 1850. In this letter, they say: "Lumber is, in some cases, selling at less than home prices, and vessels are extremely low. We see no fair prospect of any essential change in either." On May 29, 1850, the defendants acknowledged a receipt of a duplicate of the letter of consignment, and further say: "There is no improvement to notice in the lumber market."

On the 27th July, 1850, the vessel and cargo arrived, and on the 31st the defendants wrote a letter, detailing, with great minuteness, the difficulties they had encountered in obtaining possession under the plaintiffs' mortgage, which was the title by virtue of which they made the consign-

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ment, and the litigation which had grown out of it, and referring the plaintiffs to their circular respecting the markets.

On the 14th of August, they again wrote to the plaintiffs, informing them of their further difficulties about the title, and that they had sold the vessel well for \$2,400. And they add: "The lumber is now being landed and stored, as we cannot get an offer of more than \$50 per M. for the lot. We have been, and shall continue to be, as economical as possible in regard to expenses, but we anticipate we shall be able to remit you but a part of your claim."

On the 31st August, 1850, the defendants again wrote to the plaintiffs, giving some further information about the litigation, and referring the plaintiffs to their circular for information of the state of the market. On the 13th September, they again wrote, chiefly concerning another suit which had been brought against them on account of the cargo, and adding: "We have no improvement to notice in the lumber market; on the contrary, prices generally are not so good as they were some weeks since." They also refer to their circular for further information concerning the market. It was admitted that all these letters were received by the plaintiffs, but they first wrote in reply under date of October 25, 1850. In this letter they acknowledge the receipt of the defendants' letter of the 13th September, but make no reference to any other letter. They give some information concerning the title to the property, to enable the defendants to conduct the litigation, but they were entirely silent on every other topic. There was no evidence tending to show that any information concerning the markets, contained in the defendants' letters and circulars, was untrue. But it appeared that the charges of unloading and storing cargoes of lumber and all other commodities at San Francisco, were then, and,

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since the discovery of gold, and the consequent high prices, had been, very great compared with the charges at other ports, and that lumber was often, though not uniformly, sold before landing. Such were the facts, in reference to which this instruction was given. And I think there was no room to contend that the plaintiffs did not have all the information, concerning the state of the market, which the defendants could give. But, in respect to this, and the other facts, concerning the rate of charges and expenses, and the fire risks, a more comprehensive answer may be given to the objection, which, in my opinion, is well founded in law, and that is, that it is not the duty of the consignee to communicate any thing, which he has a right to presume the consignor knows. Now, when a merchant makes a consignment to a distant port, he is presumed to be acquainted with the nature of the business in which he engages; and this includes not only the customary modes of buying and selling, but the usual rates of charges, and the risks to which his property will be subjected at that port. And accordingly it will be found, by examining the decisions, that no one of them, so far as I know, has ever required information on these points to be given by the consignor.

The rule, as laid down by Mr. Justice Story, in his Commentaries on Agency, (section 258,) is: "If the principal, having received information from his agent, of his acts, touching the business of his principal, does not, within a reasonable time, express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to a ratification."

This requires information of the acts of the agent, but not of those surrounding circumstances of a general nature, which usually accompany all such transactions, and which the principal must be supposed to be cognizant of

when he made the consignment, and to have kept himself informed of afterwards.

Take the rule laid down in *The Richmond Manufacturing Company v. Starks*, 4 Mason, 296, which is supported by the authorities, that if a merchant neglects, after a reasonable time, to object to an account current, he is deemed to acquiesce in it, and it is treated as an account stated; it is manifest an account current conveys no information concerning the previous or expected states of the market. In *Cairnes v. Bleeker*, 12 Johns. R. 300-306, Mr. Justice Spenser says: "It is a salutary rule, in relation to agencies, that when the principal has been informed of what has been done, he must dissent, and give notice in a reasonable time, otherwise his assent to what has been done shall be presumed." And the same law may be found in *Bredin v. Dubarry*, 14 Serg. & Rawle, 30, and in other cases.

Certainly the consignor must not be misled by the consignee, upon any point, general or particular; and he is entitled to such information concerning the acts of his agent as will put him upon a decision of the question whether he will ratify a departure from his orders. Thus, if the agent does not plainly disclose that he has departed from instructions, as was the case in *Courcier v. Ritter*, 4 Wash. C. C. R. 549, he is not bound to reply. So I think the principal is entitled to a fair statement of any special circumstances which have induced the agent to depart from his instructions. And in this case there was such a statement; for in letters previous to that of the 13th of September, the defendants had informed the plaintiffs that lumber was very low, that there was no immediate prospect of its rise, and in the letter of the 13th of September they say: "The lumber is now being landed and stored, as we cannot get an offer of more than \$50 per M.

for the lot;" and there was no evidence in the case tending to show that this was not true, or that it was not the cause for their landing the cargo.

Indeed, I do not understand the plaintiffs' counsel to contend, that the instruction given would not have been correct, if the consignment had been made to a port like Liverpool, or New Orleans; but it was argued that San Francisco, being in 1850 comparatively a new place of trade, the same presumption of knowledge, or the same duty, on the part of the consignor to inform himself concerning these general facts, did not exist. But I do not think the rule of law varies with the age and amount of trade of the port of destination. If it were to do so, I can conceive of no standard which could be applicable to any case. How old must a port be, and how much trade must it have had, and how long continued, to exempt the consignee from the duty of going into a minute history of all the facts which could have a bearing upon the interest of the consignor? If the trade is recent, if it is subject to great and sudden fluctuations, if the dangers from marine or fire perils at the port are unusual, the consignor may reasonably be supposed to have known these facts when he sent his property there; because, ordinarily, men do not embark in such enterprises without informing themselves on these points. And perhaps no case could be put which would afford a better illustration than this, of the impropriety of allowing the rule of law to be varied on account of any of these circumstances. For, in the first place, though the trade was recent, yet it is known to have attracted a most extraordinary degree of attention from the commercial world, and its details were, and have continued to be made public, and watched with great interest, almost from day to day. And if I were now to hold, that San Francisco was not, as a place of commerce, in 1850, within

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the settled rules of law concerning the relative rights and duties of consignors and consignees, I fear I should be doing great practical injustice, and certainly I should not be able to say, at what period in its commercial life, these rules first began to be applicable. This would introduce a degree of uncertainty into the vast commercial transactions of that place, which would be as little consistent with the just interests of those engaged in them, as with the law itself, as I understand it.

The motion for a new trial is overruled, and judgement is to be rendered on the verdict.

HENRY W. HEYDOCK *et al.* vs. JOHN T. STANHOPE, *et al.*

In construing the statute of Rhode Island to prevent fraudulent conveyances, this Court follows the construction settled by the highest Court of that State. By the law of Rhode Island, an assignment of all the property of an insolvent debtor, for the benefit of all his creditors, stipulating for a release, and that the dividends of creditors refusing to become parties shall be paid to the assignor, is not fraudulent and void on its face.

THIS was a bill in equity, filed by the complainants, merchants, in the city of New York, against John T. Stanhope, William H. Cranston, Jacob Weaver, and Sarah H. Weaver, citizens of Rhode Island. The bill alleges that, at the June term, 1848, of this Court, the complainants recovered a judgment at law against John T. Stanhope, whereon execution issued, and was levied on certain merchandise found in the shop of the defendant, Stanhope; and that the defendant, William H. Cranston, caused the same to be replevied out of the hands of the marshal, by

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a writ of replevin issuing out of and returned into the Supreme Court of Rhode Island, claiming the said merchandise as his own property; that the action of replevin was duly entered, but has not been tried, having been continued from term to term. The bill further alleges, that, on the fifth day of June, 1848, Stanhope made an assignment of all his property to Mr. Cranston, in trust for the creditors of Stanhope, and annexed a copy of the deed of assignment, and charges that it was fraudulent as against creditors, and void. The particular grounds upon which the charge of fraud is rested, are noticed in the opinion of the Court.

The bill also alleges, that at or about the same time when the assignment was made, and in part execution of the same design, to defeat the plaintiff's execution, Stanhope conveyed some land to Jacob Weaver; and it further charges that Sarah Weaver, who is named in the schedule of preferred creditors annexed to the assignment, was not a *bond fide* creditor, her claim being fictitious, and inserted by a fraudulent concert between herself and Stanhope, to aid him in withdrawing a part of his property from his just creditors.

The defendants having answered, the cause was set down, and heard on bill and answers.

Potter and Turner, for the complainants.

Ames, for the respondents.

CURTIS, J. The complainants, who are judgment creditors, ask the aid of the Court to remove an obstacle to the levy of their execution on personal property, alleged to belong to the judgment debtor, upon which they assert they have acquired a lien. Their general ground is, that the debtor, just before their execution was sued out, and with an intent to prevent its levy, made a fraudulent convey-

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ance of all his property to Mr. Cranston. Of course, it is incumbent on them to show that the conveyance, which is admitted to have been made, was fraudulent and void, as they allege. And inasmuch as the cause has been set down by the complainants, and heard upon bill and answer, all pertinent facts, stated in the answers, must be taken to be true, and the Court must find the fraud upon, or as a legal conclusion from, those facts.

It is necessary, therefore, to examine the grounds upon which the bill rests the charge of fraud, and see how far they are confessed or denied by the answers.

These grounds are, that the debtor made the assignment with an intent to delay and defeat the levy of the complainant's execution; that the assignor and assignee both had that end in view, when the assignment was made; that it was not intended to be a real transfer of property, for the benefit of *bona fide* creditors, but only a colorable arrangement, placing the nominal title in Mr. Cranston, but really leaving the whole control of the property, and its substantial ownership, in the debtor. And as evidence of this, the bill charges that the debtor was not in fact insolvent, and so not in a condition to make an assignment of all his property for the benefit of his creditors; that in point of fact, he continued, after the assignment was made, to have the custody and possession of the merchandise, and to sell the same as before; that the assignee exercised no supervision over him; that the schedules of property annexed to the assignment had no values or estimates of value, and were so left to prevent creditors from obtaining information; that a fictitious debt to Mrs. Weaver, the mother-in-law of the assignor, was placed on the schedule of preferred creditors; and that about the same time when the assignment was made, the assignor made a fraudulent

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conveyance of some real estate to another defendant, Jacob Weaver.

Before examining the answers, to see how these charges are met, it is material to notice, that whatever may have been the actual intentions of the parties, no conveyance can be impeached as fraudulent as against creditors, unless it is capable, in point of law, of executing, or aiding in the execution of some illegal purpose. It is upon this principle, that an exercise of the common-law right of preferring one creditor to another, is sustained. If one creditor has recovered a judgment, and is about to levy an execution to satisfy it, and the debtor, being insolvent, conveys his property to another creditor, whom he chooses to pay in preference to the other, though his design is to delay and defeat the latter, yet his conveyance executes only a legal intent to pay a just debt, and so is valid. And therefore, if it were admitted in this case, that the purpose of the assignor was to delay and defeat the complainant's execution, if he has only exercised a legal right to appropriate his property to pay certain favored creditors in full, and to distribute the surplus ratably among all his creditors, his intent does not avoid the deed, which is not capable of executing or aiding in the execution of any thing but a legal intent. Whether, under the law of Rhode Island, it would avoid an assignment, otherwise valid, to a trustee, for the benefit of creditors, if it were proved that the assignor and assignee, when it was made, intended not to execute it, but to use it, only to enable the debtor to continue to enjoy the property assigned, I do not find it necessary in this case to decide. In Massachusetts, it has been held that it would. *Johnson v. Whitwell*, 7 Pick. 71. It is a question not free from difficulty in Rhode Island, because the statute law of the State enables any

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creditor interested in the assignment to come into the Supreme Court and compel the assignee to give an inventory of the property, and secure the execution of the trusts, by a bond with sureties, and the assignee is liable to be removed for neglect or misfeasance. Substantially the same ends are attainable by the aid of a Court of Equity, under its jurisdiction over trusts. Inasmuch, therefore, as the deed which conveys the property does not, at the same time, actually create the trusts in favor of creditors, which form a full and legal consideration for the conveyance, and which the assignee is compellable to execute, it is certainly difficult to maintain that his intention not to execute them vitiates the deed. It would seem that the deed was incapable, in point of law, of aiding in the execution of an intent to hold the property for the debtor, and so was valid, even if that intent existed. But, as I have said, I do not find it necessary to decide this question, because both the assignor and assignee, in their answers, not only declare in general that the assignment was made in good faith, for the benefit of creditors, but they deny every fact alleged in the bill as evidence that the assignment was colorable. In respect to the possession and control of the property, the assignee says that by the assignment it was made his duty to judge whether it was most for the benefit of the *cestuis que trust* to sell the property at public or private sale; that he believed the latter to be best, and that from the knowledge of the business and customers, possessed by the assignor, he considered it expedient to employ him as his clerk, to make sales of the merchandise, under his supervision and control; that the property was in his possession, in a store hired by him, and not, at any time after the assignment, in the possession of the assignor; that he believes the assignor was insolvent, and the debt to Mrs. Weaver real and justly due, and he knows nothing of the

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conveyance to Jacob Weaver; that immediately after the assignment was made, he gave public notice thereof to all creditors of the assignor; and, so far as he has been able, has in good faith executed the trusts which it declares.

Stanhope's answer contains the same facts concerning the custody and possession of the property, and declares that he was insolvent; that the debt to Mrs. Weaver was justly due for so much money lent to him by her, and denies that the conveyance of the real estate to Jacob Weaver was without consideration, though it admits that the consideration was a note payable to his wife, to whom the estate in the land descended.

Mrs. Weaver's answer avers, that the debt to her, mentioned in the schedule, was justly due, for that amount of money lent, and states from what source she obtained the money.

Jacob Weaver answers, that he was led to purchase the undivided interest which his sister, Mrs. Stanhope, had in this land, because it was the residence of his mother, who, he was afraid, might be disturbed, if Stanhope were to sell it to another, as he feared he might do, knowing him to be embarrassed by debts, and in want of money; that he paid the full value for the estate of his sister by a note, payable to her; and that he made the purchase in good faith.

It is not necessary for me to investigate particularly the question of the validity of this sale of the real estate, because it is only as evidence of the fraudulent purpose of Stanhope, in making the assignment, that this transaction is introduced into the bill, no relief being prayed, and no case for relief stated, as respects this land, on which the complainants have acquired no lien at law, or made any attempt to levy their execution. And as the answers, both of the assignor and assignee, deny the fraud charged in

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the bill, and every specific fact therein charged, from which fraud is inferrible; and as these denials must be taken to be true, it would be of no importance, if I were satisfied that other property was conveyed by the debtor, about the same time, to defeat his creditors.

It remains only to consider an objection to the assignment, which appears upon its face.

The assignment contains these clauses:

“He shall pay to my creditors of the first class, enumerated in schedule A, which said schedule is hereby referred to and made a part of this assignment, the full amount of their respective debts, in the order in which they are named, the amounts now due each of them, and which are stated as correctly as the same can now be ascertained; should the balance of said proceeds be insufficient to pay the remainder of my creditors, as enumerated in schedule B, which said schedule is hereby referred to and made a part of this assignment, then he shall make an equal distribution of said balance among all said creditors of the second class, as enumerated in said schedule B, according to their respective claims, provided said creditors shall discharge said Stanhope from all liability for the balance due from him to each, after the payment as aforesaid of each creditor's share of the estate and effects hereby assigned. If any creditor shall refuse to discharge said Stanhope as aforesaid, then, and in every such case, the share of such person or persons so refusing shall be paid by said assignee to said Stanhope.”

Whatever might have been the view taken by this Court, of an assignment containing such clauses, I do not feel at liberty to treat the title, acquired by the assignee, as fraudulent and void under the statute law of Rhode Island, if the highest Court of that State, construing the statute of Rhode Island, have deliberately and finally adjudged it to

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be valid. In *Brashear v. West*, 7 Peters, R. 615, the Supreme Court, considering the effect of a clause in an assignment requiring a release, and reserving the surplus to the debtor say; the property is not entirely locked up; a Court of Equity may reach it; and whatever may be the intrinsic weight of the objection, it seems not to have prevailed in Pennsylvania; and the construction which the courts of that State may have put on the Pennsylvania Statute of Frauds, must be received in the Courts of the United States.

I understand it to have been settled in Rhode Island, under the Statute of Frauds of that State, that clauses, like those now in question, do not *per se* render void an assignment of all the property of a debtor, for the benefit of his creditors. The Chief Justice of the Supreme Court of Rhode Island has, upon my application to him, placed in my hands a copy of an opinion of that Court, in the case of *Dockray v. Dockray*, by which it appears that the construction put on the statute of Rhode Island, that these clauses do not vitiate an assignment, is settled, and under it a great number of titles to real as well as personal estate have been made during a considerable period of time.

In the language of the Supreme Court, this construction must be received by me; and in conformity therewith, I declare these clauses do not of themselves vitiate the deed under the statute of Rhode Island.

The result is, that the bill must be dismissed, with costs.

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Where a testatrix empowered a trustee to sell lands, for purposes of reinvestment, "when the major part of my children shall recommend and advise the same," it was held that the consent of the major part of those living at the time when the sale was made, was sufficient.

The tenant for life, together with the contingent remainder-man in fee may represent the inheritance in a bill for specific performance, though their interests are merely equitable, provided the issue of the remainder-man will take, if he fails to do so by reason of the contingency.

A court of equity will not force on a purchaser a doubtful title; and a title may be doubtful, because it depends on a doubtful interpretation of a will, if all parties who may be interested in the estate are not bound by the decree.

BILL for the specific performance of a contract for the sale of land in the city of Newport. The case was, that Mary Gibbs, being seised of the land in question and other lands, and possessed of personal property, on the nineteenth day of May, 1823, made a will, whereby, in respect to her lands, she devised as follows :

"I give and devise to my brother, Walter Channing, of Boston aforesaid, Esquire, all my dwelling-houses, farms, lands, and real estate, situate in the State of Rhode Island, and also all my lands, dwelling-houses, and real estate of every description, situate in the Commonwealth of Massachusetts or elsewhere, to have and to hold the said farms, lands, houses, and real estate, to him the said Walter, his heirs and assigns, *upon the special trusts*, following, and no other, to wit: that he and his assigns shall and do take or cause to be *taken reasonable and proper care* of said lands, dwelling houses and other real estate, and, at his discretion, *maintain and preserve the buildings* in repair, and make such improvements of the farms as he shall think necessary, or for the interest of my children, and shall and do

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take and receive the rents, issues and profits of said farms, dwelling-houses and other real estate during the lives of my said children, George, William C., Ruth, and Sarah, the survivors and survivor of them, and after deducting from the same all the expense of maintaining and preserving the buildings in repair, and making such improvements of the farms as he or they shall judge to be necessary, or for the interest of my said children, and the reasonable charges and expenses of executing this trust as respects the real estate, and a reasonable compensation to himself and themselves for his and their services therein, shall and do pay the rest and residue of all said rents, issues and profits semiannually to and among my said children equally during their joint lives; and if one or more of them should die before me, leaving issue, then to pay to such issue the parent's share or proportion thereof, and if without leaving issue, then to pay such deceased child's share or proportion to and among my surviving children equally.

“ And upon this *further trust*, that from and after the decease of any and each of my said children, after my decease, leaving issue, the said Walter, his heirs and assigns, shall and do pay to the issue of such child the whole of the share of rents, issues and profits, his or her parent, my child, would have been entitled to if living, during the lives of my surviving children, the survivors and survivor of them equally to be divided among such issue; and if my child, so dying, shall leave no issue, then to pay the whole of such child's share of said rents, issues and profits to my surviving children, and the issue of such as shall have deceased, equally among them, according to the stocks, during the lives of my said children and the survivors and survivor of them, and upon and after the decease of the longest liver of my said children, then upon *this further trust*, and confidence that said Walter, his heirs and assigns,

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shall and do, by proper and legal deeds and instruments for the purpose, convey, assign and transfer to the children of my said children and the issue, (if any) of such grandchild or grandchildren as may have deceased, (*the children of a deceased child or grandchild in all cases in this will to represent their parent,*) all the aforesaid lands, dwelling-houses, and other real estate herein given in trust to said Walter, and all his and their right, interest and estate therein, to be equally divided among them, according to the stocks; and I do hereby further expressly grant, devise and direct that all the aforesaid lands, dwelling-houses, and other real estate before mentioned, shall, from and after the decease of the longest liver of my said children be and remain to the sole use and behoof of the children of my deceased children, and the children of such of my said grandchildren, if any, as shall have deceased and their heirs in fee-simple for ever, in the shares and proportions aforesaid. *Ninth*, I give and bequeathe to my said brother, Walter Channing, all the residue and remainder of my personal estate of every description to have and hold the same to him, his heirs, executors, administrators, and assigns upon these *special trusts* following and no others, to wit: that he and they shall and do invest the whole of said residue of my personal estate in stocks, or loan the same on mortgage or other good security, at the discretion of my said trustee, and keep the principal so invested or placed out at interest, or mortgage, or other good security, during the lives of my said children and the survivors and survivor of them, and during all that time shall and do collect and receive the dividends, interest and income accruing on said principal, and after deducting from the same the reasonable charges and expenses of executing the trust as respects the personal estate, and a reasonable compensation for the services of the trustee therein, shall and do

pay the residue of said dividends, interests and income, semiannually, to and among my said children equally during their lives, and if one or more of them should die before me, leaving issue, then to pay to such issue the share their parent, my child, would have been entitled to, if living; and if without leaving issue, then to pay such deceased child or children's share equally to and among my surviving children and the issue of such as shall have deceased, equally, according to the stocks; and upon *this further trust*, that upon and after the decease of any or either of my said children, after my decease, leaving issue and a widow or widower, that the said Walter, his heirs, executors, administrators, or assigns, shall and do pay to such widower or widow dollars per annum, as long as he or she shall remain single and unmarried, and no longer, and shall and do pay to the issue of such child, semiannually, the residue (after deducting said annuity) of the share of said dividends, interest, and income, that their parent, my child, would have been entitled to, and upon and after the decease or marriage of their surviving parent shall and do pay the whole thereof to the said issue of such deceased child during the lives of my surviving children, and the survivors and survivor of them; and if such child, so dying, shall leave issue, and his or her wife, or husband, shall have deceased in the lifetime of such child, then that said Walter, his heirs, executors, administrators, and assigns, shall and do pay to such issue, semiannually, equally among them the whole share of said dividends, interest, and income which such deceased child would have been entitled to, during the lives of my surviving children and the longest liver of them, and if such child so dying after me shall leave a widow or widower, and no issue, then that said Walter, his heirs, executors, administrators, or assigns, shall pay to such

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widow or widower, five hundred dollars per annum so long as he or she shall remain single and unmarried, but no longer, and the residue thereof, after deducting said annuity, shall pay to my surviving children, and the issue of such other or others as may have deceased, semiannually, and from and after the decease of such widow or widower, shall pay the whole of such share of said dividends, interest and income, semiannually, to and among my surviving children, and the issue of such as may have deceased, equally among them, according to the stocks, during the lives of my surviving children and the survivors and survivor of them; and if my child, so dying, shall leave neither issue, nor a widow or widower, then to pay the whole of said child's share of said dividends, interest and income to and among my surviving children, and the issue of such other child or children as may have deceased, equally among them according to the stocks, during the lives of my surviving children, and the survivors and survivor of them; and upon and after the death of my said children, and the longest liver of them, then upon this *further trust and confidence*, that said Walter, his heirs, executors, administrators, or assigns, and any trustees under this will, shall and do, by legal and proper deeds and instruments for the purpose, convey, assign, transfer, and deliver over to the children of my said children, and the issue, if any, of such grandchild or grandchildren, as may have deceased, equally among them, (the children of a deceased child or grandchild, in all cases in this will, to represent their parent,) all the stocks, mortgages, bonds, notes, and other securities for money, and all other personal estate, which he or they shall have received, taken and holden as trustee or trustees under this will, or which he or they shall have in his or their hands, except so much as may be necessary to pay the annuities aforesaid to a surviving husband or wife of

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one or more of my deceased children as hereinafter is provided; and it is my will, and I hereby direct that in case the husbands of my said daughters, or either of them, or the wives of my said sons, or either of them, should survive the longest liver of my said children, then the said Walter, his executors, and administrators, or any trustee under this will, shall retain out of the share, the issue of such daughter or son would have been entitled to, so much personal estate as will yield an income sufficient to pay the annuity herein given to the surviving parent of such issue, and to hold the same and appropriate and apply the interest and income thereof to the payment of such annuity to such surviving parent, so long as he or she shall remain single and unmarried, and upon his or her death or marriage, whichever shall first happen, then to pay and transfer the personal estate so reserved, to the issue of such daughter or son, equally among them; *provided, however*, if such issue shall secure to their surviving parent, to his or her satisfaction, the payment of said annuity, then the said trustee shall pay to such issue the whole of their share of said personal estate.

“*Tenth.* I hereby authorize the said Walter, and any person who may hereafter become trustee under this will, upon the application of any of my children in writing, or of the guardians of the issue of such child as shall have deceased, to invest a portion of such child's, or issue of a child's share of my personal estate, not exceeding five thousand dollars, in the purchase of life annuities for the benefit of such child, or issue of any of them, and upon their lives, and the life of the husband or wife of such child, at the discretion of said trustee.

“*Eleventh.* And if my said brother, Walter, from any cause whatever, shall wish to be acquit and discharged from this trust, or if he shall be desirous of having some

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other person or persons joined and associated with him in this trust, I do hereby fully authorize and empower him to substitute and appoint in his stead and place, or as an associate trustee to act with him, as he shall think necessary or most expedient, any one or more persons, that he alone, or he and my executors, shall think fit and well qualified to execute said trust, and thereupon to convey, assign, and transfer the whole real and personal estate of every description, which he shall hold in trust under this will, to such person or persons, either to hold to him or them and their heirs, in his, said Walter's, place and stead, or to hold jointly and together with him, and in either case upon the same special trusts, and for the same uses, and subject to the same limitations as are expressed in this will, and as the said Walter held the same under and by virtue of this will; and further, in case my said children shall, in writing, request him, said Walter, or any trustee or trustees he may appoint, to relinquish the trust, then I hereby authorize and request him, and such other trustee and trustees to relinquish said trust accordingly, and I do in that case authorize and empower the Judge of Probate for the county where this will shall be proved, to appoint such trustee or trustees as he shall deem fit and suitable to execute said trust in his or their place or stead; and in case said trustees, or either of them, shall refuse to resign the trust upon such request by my said children, I hereby authorize and empower the Judge of Probate to remove him or them from the office of trustee, and to appoint other fit and suitable persons in their stead. And I further authorize, direct and require the trustee and trustees under this will, who shall resign their trust at the request of my children, or be removed by the Judge of Probate, to assign and transfer to the person or persons who shall be appointed trustees by the Judge of Probate, all the estate, real and personal,

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which the trustee and trustees so resigning or removed then hold under this will, to be held to and by the new trustees, so appointed, and the survivor of them and his heirs, upon the trusts, and for the uses, and subject to the limitations expressed and contained in this will, and no other, and to prevent a failure of trustees to execute this will, I authorize and request the Judge of Probate for the county where it shall be proved, to appoint such trustee or trustees to execute the trusts herein contained and created, as the trustee herein named and my executors shall recommend, and on failure of such recommendation, such trustee as said Judge shall deem fit and suitable.

“ *Twelfth.* Reposing in my said brother, Walter, full and entire confidence, I do hereby expressly declare, that he is not to be responsible for any loss whatever that may happen in the execution of this trust, unless it should happen through his own wilful default, and that the said Walter and the trustees he shall appoint are not to be accountable or responsible the one for the other, or for the acts, doings, or defaults of the other. And as the said Walter has, upon my solicitation, consented to accept the trust, I further request and direct, that no bond be required of him for the faithful discharge of the trust. And I further order and direct that such compensation be allowed to the trustees who shall execute the trust herein created, for their trouble, responsibility and services as my executors shall think reasonable, and in case of their death or disagreement, as the Judge of Probate for the county where this will shall be proved, shall allow and declare to be just and reasonable.

“ *Thirteenth.* I hereby give, devise, and grant to the said Walter, and any other trustee and trustees he may appoint, pursuant to the power herein given him, full power and authority to sell and convey any part or parcel of the real

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estate devised to him in trust as aforesaid, except my two farms situate easterly of Easton's Beach, in Middletown, in the State of Rhode Island, and my farm situate westwardly of Easton's Beach and Pond in Newport, in said Rhode Island, to hold to the purchaser in fee-simple discharged of said trust, or to exchange the same for other real estate, *when the major part of my children* shall recommend and advise the same, and to invest the proceeds in other real estate, or in personal estate, as my children shall direct and advise; *and in default* of such direction and advice, as the said trustee or trustees shall think most for their interest, to be taken and held upon the same trusts and for the same uses, and subject to the same limitations as the estate sold or exchanged was holden by said trustee or trustees.

"*Lastly.* I hereby revoke all former wills by me made, and declare this only to be my last will and testament. And I hereby appoint my said brother, Walter Channing, John Parker, Esquire, of said Boston, and the Honorable William Prescott, of said Boston, sole executors thereof."

In the year 1825, the testatrix, then a resident of the city of Boston, died, and her will was duly proved in the Probate Court of the county of Suffolk, and afterwards was duly registered in the Probate Court of the town of Newport, pursuant to the statute of the State of Rhode Island, so as to give effect to the same as a will of lands. Walter Channing, named in the will as trustee, having declined the trust, the complainant, William D. Sohier, was duly appointed trustee.

The children of the testatrix, living at her decease, were the same who are mentioned in the will, viz. George, William C., Ruth, and Sarah. George died after his mother. His children and heirs at law, together with Ruth and

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Sarah, advised and assented to the sale of the land in question, by the trustee, to John D. Williams. William C. Gibbs, the only other surviving child of the testatrix, refused to assent to the sale. He, however, attended the auction, and bid for the land. The purchaser, Williams, declines to take the title, upon the ground that the power of sale was not duly executed, only two of the children of the testatrix having advised the sale. This question was raised by a demurrer to the bill.

CURTIS, J. The purchaser objects to taking the title offered by the vendor, because the latter had not power, under the will of Mrs. Gibbs, to make the sale. The thirteenth clause of her will confers the power to sell "when the major part of my children shall recommend and advise the same." This makes the recommendation and advice of a major part of her children a condition precedent to the exercise of the power. If this condition has not been complied with, it is the same as if no power of sale existed, and no title can be made. The question is, if it has been complied with. This is purely a question of the intention of the testatrix, to be deduced by construction from her will. Some very nice distinctions concerning the survivorship of powers have been taken in the ancient common law, though I apprehend that, even in those cases, the only purpose of the courts was, to arrive at the actual intention of the donor of the power. Co. Lit. 112 *b*, 113 *a*, 181 *b*; Dyer, 177. And in modern times, this is clearly the object in all those cases which are not governed by statute law. *Peter v. Beverly*, 10 Peters, 532; 1 How. 134; *Osgood v. Franklin*, 2 Johns. C. R. 19; Sheppard's Touch. by Preston, 526.

To determine the question raised in this case, it is therefore necessary to ascertain whether the testatrix, by the words, "the major part of my children," meant all her

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children living at her decease when the will speaks, or only such of her children as might be living when it should become necessary to act.

The power of sale given to the trustee, and made dependent for its exercise upon the consent of a majority of the children, is merely for the purpose of reinvestment. In our country, where such great changes take place in the uses of lands during one life, prudence dictates the insertion of such a power in nearly every settlement of property. And when this testatrix was creating a trust, to continue during so many lives, and was inserting such a power, there is a probability that she intended it should not become impossible to exercise it, on the decease of only two of her children, and that the decease of only one of them should not enable one of the survivors to control the other two and the trustee, and prevent an exercise of the power.

Mr. Sugden, (1 Sugd. on Powers, 144,) lays down this rule: "As the law now stands, it seems, that where the authority is given to three or more generally, as to 'my trustees,' 'my sons,' &c., and not by their proper names, the authority will survive whilst the plural number remains." In 1 Chance on Powers, 242, 243, this position is examined, and the result arrived at is: "Upon the whole, though a court might, in aid of the probable intention, extend the doctrine of *Vincent v. Lee* to the case of a power not preceded by an estate, it would, it is conceived, be unsafe in practice to act upon such a supposition."

The testatrix not only uses language in this particular clause which designates a class, but she omits the word, "said." In the other parts of her will, she uses the expression, "my said children," which is strictly equivalent to naming them. Here she says only, "my children." A circumstance of no great weight, certainly, but leaving the descriptive words applicable to a class of persons gene-

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rally, not designated by their names, and coming, therefore, within the rule as laid down by Mr. Sugden.

In *Hewett v. Hewett*, 2 Eden, 332, Lord Chancellor Northington, chiefly upon the ground of the presumed intention of the donor to have a power continue as long as the estate, held that it descended to the heirs of the surviving donee of the power. Now the presumption in this case, of the intention of the testatrix to have this power to consent continue, is certainly strong, not only for the reason above given, drawn from the expediency of such a power, but because the power itself is unlimited in point of time, and seems to have been intended to be exercised by the trustee, at any period during the existence of the trust; and yet the consent is essential to the exercise of the power. It would seem also, that when the testatrix created a power to be exercised for the interest of her children and their issue, and required the consent of a major part of her children, she would naturally have, in her mind, and expect to consent or refuse, only those living when the consent or refusal should become necessary, for no others could act; and that if she had intended to require the consent of a major part of all her children, though some of them should be then dead, she would have so declared in express terms. My conclusion is, in accordance with the rule laid down by Mr. Sugden, and in aid of the probable intention of the testatrix, that the major part of the children living when the power was to be exercised, were capable of consenting to the execution of the power, and that their advice and consent was sufficient.

But, at the same time, it must be admitted, that the question is not free from doubt, and therefore I have felt obliged to look at some other considerations connected with this case.

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Where the question is, whether a title shall be forced on a purchaser, the Court is bound to see that the title is not doubtful. A title may be doubtful because it depends on a doubtful question of law, not settled by any binding authority, of which different courts may take opposite views, and where those who may hereafter claim an interest in the estate will not be concluded by the decree. A purchaser should not be compelled to take a title which there can be no judicial certainty he can force another to take, under which the Court cannot know he can himself hold the land, against parties not before the Court, or precluded by its decree.

In *Wilson v. Bennett*, 5 Eng. L. & Eq. R. 45, where the objection was that the power of sale was not sufficient, the Vice-Chancellor held that the point was too doubtful to force the title on the purchaser, and refused the relief; and in *McDonald v. Walker*, 11 Eng. L. & Eq. R. 324, where the same objection was made to the title, and the point of law was involved in conflicting decisions, it was held that the uncertainty was fatal to claim for relief. And in *Wilson v. Bennett*, 13 Eng. L. & Eq. R. 431, relief was refused on the same ground.

The question whether the children and grandchildren of the testatrix, who are all before the Court, can so represent the inheritance, as to enable the Court to make a decree, binding on whomsoever may succeed to it, is, therefore, of the first importance in this cause.

To determine this question, I must first see what are the estates devised by this will. This does not involve much difficulty. The trustee clearly has the legal estate in fee-simple, not only because it is limited to him in fee by appropriate words, but because the due execution of his trust requires him to have it. This fee he holds until the decease of the last surviving child of the testatrix, for

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the purpose of collecting and paying over the rents and profits to those entitled to them; and upon the decease of such last surviving child, he holds the fee, to serve the uses declared in the will, and by force of the statute of uses or of wills, and it is immaterial which, the legal estate vests at once in the then surviving grandchildren, and in the issue of any deceased grandchild, as tenants in common. The only equitable estates created, are an estate for life in each child of the testatrix, remainder to his or her issue as tenants in common until the decease of the last surviving child of the testatrix. At that point of time, the equitable estates all terminate, and the legal estates vest as above mentioned. To ascertain whether the children and grandchildren are now capable of representing the inheritance, it is necessary to see what each grandchild's relation to the inheritance now is; and I take the children of Mr. William C. Gibbs, who is still living, because it is necessary that all should be thus capable.

His children, then, if they survive him, will be entitled to the legal estate in fee, if he shall be the last surviving child of the testatrix; if not, they will be entitled to an equitable estate in the rents and profits during the life of such last survivor, and if any of them die before its termination, it goes to their issue, and continues in such issue until they shall take the legal estate. And this equitable estate for lives is now vested in his children, subject to be divested by death before the parent.

There is therefore before the Court, William C. Gibbs, who has an equitable estate for life, and from and after his decease, either the rents and profits of the land, or the land itself, will go to his issue; it being contingent, however, as in case of tenancies in tail, whether his children, or grandchildren, or more remote issue will first take. And there are also before the Court his children, who are entitled as

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above-mentioned. Lord Redesdale, (*Giffard v. Hort*, 1 Sch. & Lef. 408,) says: "It is sufficient to bring before the Court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person, then the tenant for life." The first two positions are supported by numerous authorities, which it is unnecessary to cite. Calvert on Parties, 48, &c. The last, respecting the sufficiency of the tenant for life, is confirmed by *Finch v. Finch*, 2 Ves. Sen. 492; *Gaskell v. Gaskell*, 6 Sim. 643; *Baring v. Nash*, 1 V. & B. 551.

In *Nodine v. Greenfield*, 7 Paige's R. 544, there was a devise of rents, and profits, and income to the testator's wife for life, with remainder in fee to the children of his brother who should be living at the time of her death, and to the issue of such of the children as should then have died leaving issue; and the testator empowered his executors, or the survivor of them, to sell the real estate for reinvestment. It was held, that the children of the testator's brother, living at the testator's death, took vested remainders in fee, subject to open and let in after-born children, and subject to be divested, by death before the testator's widow, and that they were necessary parties to a bill of foreclosure, and that with the tenant for life they could represent the inheritance, though their right of possession was contingent.

The case at bar differs from *Nodine v. Greenfield* in this: that here there is a trustee interposed, who holds the legal estate. But I do not consider this material. For the grandchildren of the testatrix have the same substantial interest in the land in this case, as the children of the testator's brother had, in that case. It is true, that in the event of their parents' death, living some child of the testatrix, their interest will, during the life of the surviving child of the testatrix, be equitable only. But I conceive this is

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unimportant. A court of equity looks to the substantial interest, and not to the particular mode of enjoyment, for this purpose of representation, and if the party before the court is one, whose interest is of such a nature as to insure his giving a fair trial to the question in contestation, that is sufficient.

If a tenant for life of an estate tail, to whose unborn issue the remainder is limited, can sufficiently represent the inheritance, because it is presumed he will act as well for them as himself, *à fortiori* can the tenants for life and the grandchildren in this case; for though the contingency may cause the latter to take only an equitable estate for a time, and may defeat altogether their possessing rights legal and equitable, yet they will be defeated only in favor of their issue, who must succeed if their parents do not. I consider, therefore, that the parties now before the Court are capable of representing the inheritance, that a decree will preclude all future claims, and consequently that whatever doubt might be raised elsewhere concerning the title is unimportant.

The demurrer must be overruled.

WARREN W. WHITE *et al.* vs. HENRY WHITMAN.

The pendency of a prior suit in a State court is not a good plea in abatement to a suit *in personam* in this court.

Such a plea must show jurisdiction of the former suit, if pending in a court not under the same sovereignty.

The absence of an affidavit, verifying the facts alleged in the plea, is fatal.

THE defendant pleaded in abatement as follows:

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" And the defendant comes and defends, &c., when, &c., and says that he ought not to be held to answer to the above writ and declaration of the plaintiffs, but the same ought to abate; because he says that the said plaintiffs heretofore, to wit, at the Honorable Superior Court, holden at Brooklyn, in and for the county of Windham, in the State of Connecticut, on the second Tuesday of April, A. D. 1853, impleaded the said defendant in an action of the case, and for the same cause in the declaration aforesaid above-mentioned; which said action of the said plaintiffs, against the said defendant, still remains depending and undetermined, as by the files and records of said Superior Court, now remaining in said Superior Court, (a copy whereof, duly authenticated, is here shown to the Court,) appears; and the said defendant avers, that the said Henry Whitman, defendant, named in said action of the plaintiffs in said Superior Court pending, and the said Henry Whitman, now defendant, are one and the same person, and not other and different.

" Wherefore, he prays judgment if he ought to be held to answer to the writ and declaration, and that the same abate, and he be allowed his costs.

" By his attorney."

The plaintiffs demurred.

Jenckes, for the plaintiffs.

Carpenter, *contra*.

CURTIS, J. The pendency of another action for the same cause in a foreign court, is not a good plea in abatement at the common law. The question is, whether the court of the State of Connecticut is to be considered a foreign court, within the meaning of this rule. In *Bowne v. Joy*, 9 Johns. R. 221, it was held that such a plea of a

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former action in another State court, was not a good plea; and in *Walsh v. Durkin*, 12 Johns. R. 99, the same law was held applicable to a plea of a former suit pending in a Circuit Court of the United States. These cases seem to me to have been correctly decided. Though the Constitution and laws of the United States require, that the judgments rendered in one State shall receive full faith and credit in another, yet, in respect to all proceedings prior to judgment, the courts of the different States, acting under different sovereignties, must be considered as so far foreign to each other, that a remedy sought by judicial proceedings under one, cannot be treated as a mere and simple repetition of a remedy sought under another. There may be real advantages to be gained, in respect to the property on which an execution may be levied, or otherwise, by resorting to an action in another State.

And the same considerations are applicable to a second suit in a Circuit Court of the United States, while one is pending in a State court.

In *Wadleigh v. Veazie*, 3 Sum. R. 165, Mr. Justice Story declared that such a plea could not be allowed.

In this case, the plea is also insufficient, for other reasons. It does not show that the court of Connecticut has jurisdiction of the action there pending; and for the reasons given in *Newell v. Newton*, 10 Pick. 470, this is a fatal defect. Nor is it verified by affidavit, as is required by the eighth rule of the Court, if any matter of fact is contained in it; and this plea does contain two traversable facts: that the parties and the cause of action are the same. *Trenton Bank v. Wallace*, 4 Hal. R. 83.

The demurrer is sustained, and the defendant must answer over.

JOHN HOLLAND *vs.* THE TOWN TREASURER OF CRANSTON.

The thirteenth section of the act of Rhode Island "concerning towns," &c., (Digest, 299,) requires notice to the inhabitants before an action on the case is brought against the treasurer, for damages suffered by reason of a defect in a highway, which the town was bound to keep in repair.

THIS was an action on the case to recover damages for an injury received by the plaintiff, through a defect in a highway, which the town was bound to keep in repair. The defendant pleaded that no notice was given to the electors of the town, pursuant to the thirteenth section of the act concerning towns, (Digest, 299.) The plaintiff demurred.

The question was argued by *Blake* and *Rivers*, in support of the demurrer; and by *Carpenter*, *contra*.

CURTIS, J. The question raised by this plea is, whether a demand against a town, for damages suffered through its neglect to keep one of its highways in repair, is within the thirteenth section of the act concerning towns, found in the Digest, page 299. This is so purely a question of local law, that I had hoped it might be found to have been settled, if not by any decision of the State courts, at least by a practice, so long continued, that it ought not to be departed from. But it appears, from the statement of gentlemen of the bar of much experience, that the practice itself has not been uniform; and the question being raised, I must determine it.

The general purposes of this section may be stated to be, to provide remedy for persons having demands upon

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towns, by enabling them to recover judgments thereon, against the town treasurers personally; and to afford means to such treasurers, to obtain reimbursement of what they may pay upon such judgments. The terms of the act are sufficiently broad to embrace this claim. Those terms are: "Every person who shall have any money due to him from any town, or any demand against any town, for any matter, cause, or thing whatsoever, shall take the following method to obtain the same," viz.: and then follows the description of the method. But it is argued, that what follows, as well as the nature of the case shows, that the act was limited to claims arising from contract, and does not include those arising from torts. In describing the method of proceeding, it requires the claimant to present "a particular account of his debt or demand, and how contracted." These last words certainly tend to show that the debts or demands referred to were such as arose from contract. In the absence of any words manifesting a contrary intent, they would be sufficient to show that. But there are such words, occurring, not in the description of the mode of proceeding, but inserted for the very purpose of describing and identifying the claims intended to be included. Any money due, or any demand, for any matter, cause, or thing whatever, do not admit of being narrowed down to claims *ex contractu*, without doing some violence to those terms. It is true they may have been intended to be thus restricted, and this intention may appear in other parts of the section, or from the nature and objects of the provision. But so the words, "and how contracted," admit of the interpretation, that they were intended to refer to cases of contracts, and to require a statement of how it was contracted, if a debt was claimed, but were not designed to import that no demand

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should be made, unless it was shown how it was founded on a contract. In other words, that this clause should be read, "and how contracted, if founded on contract."

It has been urged, also, that torts are not included, because it is not practicable to present "a particular account" of such a demand. Certainly a claim for unliquidated damages for a tort is not a subject of account; but neither is a claim for unliquidated damages for breach of contract. And to include them, it is necessary to understand the word account, not in its strict sense, but more popularly, as equivalent to statement. It was further argued, that claims like this were not within the mischief intended to be provided against. That mischief appears to have been, that towns might be involved in litigation, without the knowledge or consent of a majority of the inhabitants; and the act was designed to secure to such majority an opportunity to determine whether the town would engage in a lawsuit, before it should be begun, or any expenses incurred. I do not perceive why such a case as this is not within that mischief, as clearly as any other. But the principal argument relied on by the plaintiff's counsel, was, that the thirteenth section of the act concerning highways, (Digest, 326,) has given an action on the case against the treasurer of the town, for damages suffered by reason of a defective way, which the town was bound to repair. And it was urged that this right is here given absolutely, and that a condition, drawn from the other act, cannot be appended to it.

This argument would be conclusive, if it were any part of the purpose of that act, concerning towns, to create rights, or define what should be legal causes of action. But it is not. It assumes that the claimant has a valid demand against the town, founded on some other law, and then proceeds to direct how it shall be treated. It says,

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"Every person who shall have any money due to him from any town, or any demand against any town, &c., shall take the following method to obtain the same." It is only the method of obtaining payment of a just demand, which this law has in view, and therefore, to say that another law has made the town liable, is only to say he has a just demand; if so, the question still remains whether he must not take that prescribed method of obtaining the same. It is true the law concerning highways not only makes the town liable, but in express terms gives an action on the case against the treasurer. But was it not intended that the action thus given should be subject to the same general rules as all other similar actions against town treasurers? To answer this question, it seems to me sufficient to observe that while this act gives the action against the treasurer, it points out no mode in which he can reimburse himself. It surely could not have been the intention of the legislature that the treasurer should be made personally liable for such a claim against his town, and then left with no sufficient remedy. This would not only be contrary to natural justice, but to the sense of it which the legislature have shown it entertained; for in the section of the act concerning towns, a remedy is carefully provided.

I cannot doubt, therefore, that, so far as respects the mode of reimbursing the treasurer, a judgment recovered in this action would be within the thirteenth section of the act concerning towns; and if so, I do not perceive how the conclusion can be avoided, that the right of the plaintiff is also regulated by that section. Because the protection extended to the treasurer is expressly limited to the cases included in the first part of the section respecting the mode of proceeding to recover claims.

To state my view more generally, I should say that the act concerning towns requires all persons, before bringing

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any action against a town treasurer for any demand against a town, to present to the electors, when legally assembled in town-meeting, a particular statement of his demand; and it enables the town treasurer to reimburse himself for what he may be obliged to pay on any judgment so recovered against him. And when the law concerning highways gave an action on the case against the treasurer, it subjected that action to the requirements of the act concerning towns, just as it subjected it to the laws concerning the service and return of writs, and the rules of pleading and proceeding prescribed by other statutes. That when the legislature say an action on the case may be brought, they mean, by complying with the requirements of the law concerning actions on the case; and when they say it may brought against the treasurer of the town, for a demand against the town, they mean, by complying with the requirements of the law concerning such actions; and one of those requirements is, previous notice.

I have been referred to the case of *Hull v. Richmond*, 2 Wood. & M. 337; but it is manifest that, though the point was there taken, it was not decided. A doubt is expressed, which I felt quite as strongly as it is there expressed, until more mature consideration satisfied me it was not well founded.

The demurrer must be overruled, and the plea adjudged a good bar.

UNITED STATES vs. CHARLES B. CUTLER.

The act abolishing the punishment of flogging in the navy, and in vessels of commerce is not a penal law, and no indictment can be framed upon it. It

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applies to whaling ships, which are "vessels of commerce," within the meaning of this act.

It prohibits corporal punishment by stripes, inflicted with a cat, and any punishment which in substance and effect amounts thereto.

The degree of such punishment is not material; it is the kind of punishment which is alone to be considered.

It is a question of fact for the jury, whether the punishment inflicted was, in substance and effect, the punishment of flogging.

Under an indictment founded on the third section of the Act of March 3, 1835, (4 Stat. at Large, 776,) if the punishment inflicted was flogging, it was without justifiable cause.

But it is incumbent on the government to prove, not only that the act was without justifiable cause, but that it was malicious, that it was a wilful departure from a known duty. If the master knew that his act was illegal, it was malicious, in the sense of this Act of 1835.

THIS was an indictment under the third section of the Act of March 3, 1835, (4 Stat. at Large, 776,) against the master of the whaling bark Dolphin, for beating one of his crew. It appeared that the man had been disobedient, and in a quarrel with the boat-steerer, under whose command he was at the time, the man had wounded him severely in the head. And that the defendant had caused the man to be seized up, and inflicted on him six blows with a piece of ratlin stuff. There was evidence tending to show, that when the master was about to inflict punishment, he called all hands, and declared that he was unwilling to flog the man, but felt it was his duty to do so; and some of the witnesses testified that he also said that he knew it was against the law, but felt obliged to go through it. The following directions were given to the jury.

CURTIS, J. The defendant is indicted under the Act of 1835, for beating one of his crew with malice, and without justifiable cause. The government must prove: 1. the beating; 2. the want of justifiable cause; 3. malice. The beating is not denied. The first question is; was there jus-

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tifiable cause? If the punishment inflicted was the punishment of flogging, within the meaning of the Act of 1850, there could be no justifiable cause, the authority of the master to punish by flogging being taken away. And it is for the jury to find whether what was done, amounted to the punishment of flogging abolished by that act. In order to decide this question, it is necessary for the jury to attend to what is the punishment of flogging referred to in that law; and my instruction is, that it is corporal punishment by stripes, inflicted with a cat, or any punishment which, in substance and effect, amounts thereto. The particular form of the instrument is not material; what you must look to is the effect produced. If the man was punished by stripes, inflicted with a rope, and this, in substance and effect, is the same *kind* of punishment as the punishment of flogging with a cat, then it is prohibited by this law. The degree of severity of the punishment is not material. It is the kind, and not the degree of punishment which is important. It may be, that one blow with a cat would inflict stripes more painful to be borne, than one blow with a piece of ratlin stuff. But this is not material, if both are corporal punishment by stripes, and both are in substance the same kind of punishment. Another question is, whether whaling ships are vessels of commerce within the meaning of this law. I am of opinion they are. I do not state the reasons which have brought me to this conclusion, for they were fully detailed in the charge given to the grand jury at the present time.

It is also incumbent on the government to prove malice. This word is not to be interpreted in its popular sense. It means, a wilful departure from a known duty. If the master knew that his act was unlawful, and did it, intending to take the consequences, that was a malicious act, within the meaning of this law of 1835.

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The Act of 1850 is not a penal law, and no indictment can be framed on it. But it has the effect to make an important change in the powers of the master, and consequently has an important effect on the question of justifiable cause and malice, arising under indictments framed on the law of 1835.

The defendant was found guilty.

Brown, District Attorney, for the United States.

Bosworth, for the defendant.

GEORGE HASTINGS *et al.* vs. GIDEON L. SPENSER *et al.*

Where an assignment, made by an insolvent debtor, was held voidable, as actually fraudulent as against creditors, and the assignee either had knowledge of the extraneous facts which rendered the assignment voidable by creditors or the means of knowing them, and was put upon inquiry, it was held, that he had no lien as against an attaching creditor, upon proceeds of the property assigned, for his services in partially executing the trusts, or for retainers paid to counsel.

THE case is stated in the opinion of the Court.

CURTIS, J. This is an action founded on the statute law of Rhode Island, (Digest 118, section 21 – 24,) against the defendants, as the garnishees of Horton & Brother, against whom the plaintiffs recovered a judgment at law in this court, at the June term, 1851.

The questions raised in this case depend upon the facts stated in the answers of the garnishees, which are, in substance, that an assignment of a large stock of merchandise and other property, was made to them by Horton & Brother in trust for creditors, which assignment was decreed

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by this court to be invalid as against the plaintiffs, and other creditors of Horton & Brother, at the November term, 1852; that immediately after that assignment was made, and before any creditor had interposed, by attachment, or otherwise, to avoid the assignment, the defendants, while proceeding to execute the trusts which it declared, sold some part of the assigned property, for the proceeds of which they admit themselves to be chargeable as garnishees; but they claim to deduct from these proceeds the sum of four hundred dollars, as a compensation for their personal services in taking charge of the property, on the 10th day of March, when the assignment took effect, and keeping the same until the 17th day of March, when it was attached, and for making the sales and collections, whence the moneys now in their hands resulted, during that period of seven days. And they also claim the right to make the further deduction of the sum of five hundred dollars, for so much money paid by them to two counsel for general retainers in respect to all questions arising between themselves, as assignees, and third persons; the counsel having been retained on the fifteenth day of March, two days before any attachment of the property, though their retainers were not actually paid until some months afterwards. No question has been made before me concerning the propriety of the amounts of either of these charges, the only question being, whether any, or all of them, in part, or in whole, are in this proceeding, a legal charge upon the fund attached in the hands of the defendants. The proceedings in the suit in equity by *Stewart v. Spenser*, in which the assignment was decreed to be void, are not in terms, made part of this case; but the answers state the fact, that the assignment which is therein mentioned is the same which was thus avoided by the decree of this court, and the case has been

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argued, on both sides, upon the assumption that those proceedings, thus referred to, are before the Court in this case.

The questions, therefore are, whether assignees, under a deed of trust for creditors, voidable by them as actually fraudulent as against them, can retain, out of the moneys received under the assignment, compensation for their personal services, rendered before any creditor interposed to avoid the deed, and for a general retainer agreed to be paid to counsel.

The garnishees are to be charged or discharged, according to the state of things existing at the time of the service of the process upon them. The question is, whether they then held property or moneys of the debtor, liable to be taken out of their hands, and applied by the law in this process, in payment of debts of the principal defendant. It is not denied that these garnishees did at that time hold funds which belonged to the debtors, the deed of assignment being imperative; but the inquiry is, whether the whole of these funds were liable to be taken out of their hands, and applied by the law in this process to the payment of debts of their assignor.

In *Thomas v. Goodwin*, 8 Tr. 12 Mass. 140, it was held, that although the person summoned as trustee may have previously received property of the debtor for the purpose of delaying creditors, yet if he has paid the proceeds to *bond fide* creditors before the service of the process on him, he cannot be held as a trustee.

In *Andrews v. Ludlow*, 5 Pick. 32, the same rule was applied to *bond fide* claims of the assignee himself, and it was held, that he could retain enough to pay himself the amount of all such claims, though the assignment was invalid.

On the other hand, in *Burlingame v. Bell*, 16 Mass. R.

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318, and *Harris v. Sumner*, 2 Pick. R. 129, it was held, that an assignment, fraudulent on its face, or actually fraudulent, could confer no lien on the assignees, so as to enable them to hold the property against the attachment thereof specifically by a creditor.

These decisions are reconcilable. Because, when the assignee is proceeded against as a trustee or garnishee, he retains, to meet his claims or payments, not by force of the invalid deed, but by that principle of law which enables him to retain funds sufficient to meet his own claims and liabilities, and requires him only to pay the balance. He is under no necessity to set up the deed; he has the right of retention to that extent, if it were wholly invalid, or had never been made. And, therefore, if these garnishees had claims against the assignors, for *bond fide* debts, contracted independently of the assignment, I do not perceive why they might not deduct from the moneys in their hands sufficient to satisfy those debts, and by paying over the residue discharge themselves from liability.

But it must be admitted, that claims for services rendered in partially executing an assignment actually fraudulent, do not stand upon the same ground as *bond fide* debts. If the assignees were themselves participators in the fraud, or, in other words, if they undertook to execute the trusts, knowing that they were fraudulent and unlawful, the law cannot recognize such services as ground for a legal claim for compensation, and cannot treat them as creditors of the assignors.

According to the evidence in the suit in equity, the assignee knew the contents of the assignment, and the facts that the assignors had absconded from the State, and carried with them some money, when they entered on the execution of the trusts. The circumstances were so peculiar, that I think they were at once put upon the inquiry,

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how much the assignors had carried away with them. Their answers declare they did not know how much, or that it was any great sum of money, until they found there was no cash on hand, and very few debts receivable. When, in point of fact, they learned this, does not appear; but it is apparent, they had the means of learning it as soon as the execution of the trust began; for they then had the books and papers of the assignors. A party who is put upon inquiry, and has the means of knowing a fact, is in equity deemed to know it. And I must therefore consider that these assignees either knew all the facts upon which the deed has been declared void, or had the means of knowing them very soon after the deed was delivered. And when they proceeded, under these circumstances, to execute such trusts, I consider that they acted at the peril of losing all compensation for their services, if creditors should interpose and the trust be declared fraudulent, by reason of facts within their knowledge.

I do not impute to them any intentional wrong; but the principles of law must be applied to their case. Upon those principles they were executing trusts fraudulent as against creditors, and they had at least constructive knowledge of the fraud. They cannot be treated as creditors upon the footing of a claim for such services.

The claim to retain for the retainers engaged to be paid to counsel is still less tenable. If they cannot retain for their own services, rendered before creditors interposed, certainly they cannot for payments made to resist creditors, by setting up a deed, invalid as against creditors, because actually fraudulent.

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MERCHANT SERVICE.

Extract from the Charge of Mr. Justice CURTIS to the Grand Jury, delivered at Providence, R. I., November 15, 1853, concerning the law of corporal punishment in the merchant service.

THE regulation of the rights and duties of merchant seamen is an important subject of the criminal laws of the United States. The power to regulate commerce with foreign nations, and among the general States, conferred by the Constitution on Congress, includes the power to prescribe rules for the government of persons engaged in such commerce. And from a very early period in the history of the government, Congress has passed criminal laws on this subject. One of those laws, which, more frequently perhaps than any other criminal law, comes under the notice of the Courts of the United States, is an act passed on the third day of March, 1835, which is in the following words:—

“If any master or other officer of any American ship or vessel, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel or unusual punishment, every such person, so offending, shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding five years, or by both, according to the nature and aggravation of the offence.”

By a series of adjudications, and by frequent practice,

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this law has acquired a settled meaning. And I should not deem it necessary to give you any special instructions concerning it, if more recent legislation by Congress had not given rise to grave doubts and difficulties concerning its present effect. To convey to your minds what these doubts and difficulties are, and to supply a solution of them, it is necessary for me to begin by explaining what is the effect of this act standing by itself.

You will observe, then, that three things are required to constitute an offence under this law.

1. That the master, or other officer of a vessel of the United States, should beat, wound, or imprison one of the crew, or withhold from him suitable food and nourishment, or inflict on him some cruel or unusual punishment.

2. That either of these should be done without justifiable cause.

3. That the motive of such act of the master or officer should be malice, hatred, or revenge.

At the time this law was enacted, the master of an American vessel was intrusted by the law with the power to inflict punishment on the crew, and to use force to compel obedience to his lawful commands; and to preserve the discipline and good order of the ship. This law, the terms of which I have repeated to you, was not intended to restrain the proper exercise of that authority, but merely to prevent its abuse. And, therefore, it requires the government to prove, not only that punishment was inflicted, but that it was without justifiable cause. That is, that there was no offence calling for punishment, or no occasion to use force, or that the force used, or the punishment inflicted, was immoderate and disproportioned to the offence.

And it also required that the act should be the product,

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not of mistake or erroneous judgment, but of malice; that is, of an evil intention. In other words, that it should be an intentional departure from a known duty.

Under this law, therefore, when it had been proved that the master had inflicted corporal punishment on one of the crew, inasmuch as in some circumstances he had the right so to punish, the government was obliged to show, not only that the circumstances of the particular case were such that the right did not exist, but that they were such that the master must be taken to have known that it did not exist, and acted in disregard of what he knew to be his duty.

In September, 1850, (9 Stat. at Large, 515,) there was inserted in an appropriate bill, passed by Congress, this clause: "Provided that flogging in the navy, and on board vessels of commerce, be, and the same hereby is, abolished, from and after the passage of this act."

It is to be regretted, that what we are bound to presume were the necessities of the case, did not permit Congress, in dealing with a subject of so much practical importance, to be more explicit in declaring its intention; and that, consequently, the powers and rights of masters and seamen, engaged in the merchant service, are involved in doubts which can be finally removed only by further legislation, or at the expense of much time and money, and no small suffering by many persons. To remove some of those doubts, so far as may be in my power, by an exposition of what I deem to be the legal effect of this clause, is my present purpose. In the first place, then, what is meant by the words "vessels of commerce."

So far as I am aware, these words are here used for the first time to describe a class of vessels. The phrases found in other laws are, "any American ship or vessel," "any vessel belonging in whole or in part to any citizens or citi-

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zen of the United States," or other equivalent terms. And the argument which may be derived from this departure from the use of these usual words is, that if Congress had intended to embrace every vessel belonging to a citizen or citizens of the United States, or every American vessel, the act would have said so; and that, instead of doing so, it restricts the operation of the law to one kind of vessels only, that is to say, vessels of commerce; and that vessels employed only in the fisheries, are not vessels of commerce; that they are recognized by the legislation of Congress as engaged in a distinct business, viz. in the capture of whales and the taking of fish, and are under restrictions and requirements, and are entitled to privileges, which are not attached to other vessels, whose business it is to carry on the intercourse and traffic of the commercial world.

It must be admitted that this argument is entitled to no small weight; and I believe the opinion that vessels engaged in the fisheries are not within this law, is entertained by some, though I do not know that it has been yet announced in any judicial decision. The great and increasing number of persons employed on board vessels engaged in the whale fishery, the length of many of their voyages, the large proportion of green hands, unaccustomed to the necessary subordination of the service, its frequent emergencies, and great hazards, the terms of the contract, by which all participate in the disappointments as well as the successes of the voyage, and in some places, there is too much reason to believe, the unfair practices which have been used to obtain men,—all combine to render it extremely important that the lawful powers of the master to inflict punishment on the crew of such a vessel, should be clearly defined. I believe it is within the experience of all who are accustomed to administer the criminal laws of

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the United States, in the districts constituting this circuit, from whence mainly, this fishery is prosecuted, that there is no class of vessels, in respect to which it is so necessary that the relative rights and duties of officers and seamen should be settled and known; or in respect to which doubts upon important points would work so much mischief. I have therefore given to this question the consideration which it demands, and my opinion is, that by this law it was intended by Congress to embrace vessels engaged in the whale and other fisheries, under the words "vessels of commerce;" and I will state briefly the reasons which have brought me to this conclusion. In the first place, I do not perceive any sufficient reasons why masters of fishing vessels should continue to possess the power to inflict the punishment of flogging, when it is taken away from all others. If, as we are bound to presume, there was a mischief to be remedied, I cannot find any firm ground upon which it can be asserted, that fishing vessels were not within that mischief. There are differences, undoubtedly, between the ordinary merchant service and the persons engaged in it, and the fisheries and those who carry them on. But if those differences are such as to render this power more necessary in whaling than in merchant voyages, they clearly render its existence less necessary in the other fisheries, in which, from the character of those employed, and the nature and terms of their enterprises, an occasion to inflict such punishment is, happily, extremely rare. And if we consider the purpose of the law to have been, to abolish this mode of punishment, because of its effects upon those subjected to it, those engaged in the fisheries, so far as I can see, have an equal claim to be protected from these effects.

And, therefore, if the words, "vessels of commerce," can be fairly interpreted so as to include vessels engaged in

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the whale and other fisheries, I feel it to be my duty so to interpret them.

From a very early period in the history of the government, Congress has regulated the vessels and the persons employed in the fisheries. Their national importance was well understood when the Constitution was adopted. Their rights and privileges had formed a prominent subject of the negotiations for peace with Great Britain, and hold an important place in the treaty of 1783. And they have at all times been treated as a subject of legislation within the constitutional powers of Congress. Yet there is no clause of the Constitution, conferring that power on Congress, except this: Congress shall have power "to regulate commerce with foreign nations, and among the several States."

It is clear, then, that unless the fisheries were a branch of the commerce of the United States, Congress would not have power to regulate them; a power which, so far as I know, has never been questioned, and certainly has been exercised so long, and in so many forms, that it must now be deemed to be beyond dispute. Nor does there seem to be any real difficulty in considering the fisheries as one branch of commerce. It has been said, by high authority, that the term commerce, though it includes traffic, is not limited to the buying and selling of commodities.

It includes also intercourse; and therefore, a vessel which merely transports passengers from one country to another, is engaged in commerce, and is under the regulating power of Congress. So it includes the mere transportation of commodities; and a vessel which carries commodities for hire, though the master or owners neither buy nor sell any thing, is engaged in commerce.

Now, though whaleships are engaged in capturing whales, and in manufacturing their oil, they are also en-

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gaged in transporting that commodity across the ocean, for sale on its arrival here. They not only transport from without the United States, one of the commodities of commerce, but that commodity is brought into the United States, and is sold for the account of those employed in the voyage and owning the vessel. In the strictest sense, therefore, such vessels are engaged in commerce, and may be called, though it is in legislation a new phrase, vessels of commerce. In this sense, I consider Congress used the words; intending to embrace in them all vessels within the commercial power of Congress.

The next inquiry is, what is meant by the word "flogging?" It is applied to the navy and to vessels of commerce. The words are "flogging in the navy and in vessels of commerce." They plainly refer to, and are intended to identify, some one known mode of punishment theretofore lawfully practised, and which was thereafter to be prohibited. And inasmuch as it is the duty of the Court to construe the statute, and inform the jury what it means, when it speaks of the punishment of flogging, I must be able to find, somewhere in the law, written or unwritten, a definition of the punishment of flogging, theretofore lawful and by this law prohibited. Otherwise it would be wholly out of my power to give any interpretation to these words. Now, the punishment of flogging in the navy was a known and lawful mode of punishment, when this law was enacted. The instrument by which it was inflicted, and the number of blows which could be ordered without a court-martial, are described in the rules and articles for the government of the navy, enacted by Congress. It may be added, that it was the only lawful mode of inflicting corporal chastisement recognized by those rules and articles. It was corporal punishment, by stripes, with what is called in the articles, a cat-o'-nine-tails. This is the only

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mode of punishment prohibited in terms by the law of 1850. But it must be taken to have prohibited it, not in this precise form only, but in substance and effect. Its prohibition is directed not against a particular form of punishment merely, but against any punishment which in substance and effect is the same as that mentioned. The form of the instrument may be varied, while substantially the same effects are produced.

And here, I think, the prohibition stops. I see no safe ground upon which it can be carried further. The law does not abolish all corporal punishment. It is plainly restricted to one particular mode of inflicting corporal punishment, described in this law, as the punishment of flogging in the navy and in vessels of commerce, and defined in the Act of Congress for the government of the navy. And consequently, whenever a case arises, in which corporal punishment has been inflicted, the first inquiry must be, was it the punishment of flogging within the meaning of this law? in other words, was it, in substance and effect, punishment by stripes inflicted with a cat-o'-nine-tails, or other instrument capable of inflicting the same kind of punishment? If not, the case is to be determined irrespective of this law. I am fully aware of the distressing uncertainty in which this subject is thus left. But it is an uncertainty which can be removed only by legislation. Having put upon the law the only interpretation which its language seems to me to admit of, if it is found to have left open much debatable ground, in a matter where plain and clear rules are especially necessary, it belongs to the power which makes, and not to that which administers the law, to prescribe these rules. One practical effect of this uncertainty is worthy of your especial notice, as it bears on the performance of your duties. I have already informed you that, in proceeding against a master under the law of 1835, the

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government must not only prove a beating or wounding, but want of justifiable cause, and malice. Now, if a case should arise, and certainly such cases are likely to arise, in which the beating was, in your judgment, in substance and effect the punishment of flogging, then you must find there was not justifiable cause, however atrocious the conduct of the seaman may have been; while, at the same time, you may be of opinion, that the master honestly thought it was not the punishment of flogging, but some other corporal punishment within his lawful power to inflict, and so did not act in disregard of a known duty, and therefore did not commit the offence described in the statute.

Before I leave this subject, I think it proper to call your attention to an important distinction, between punishment and the use of force to compel obedience to a lawful order. The necessities of the service require of the crew prompt obedience to the orders of the master, or other commanding officer. These necessities are such, that it is often inconsistent with the general safety to permit delay or hesitation. In all such cases, the master, or other officer in command has the right to compel obedience by the use of the necessary force.

He also has the right, and it is his duty, to interpose to quell all affrays between the officers and men, and especially all forcible resistance to his lawful commands. And he may and should use that degree of force in doing so, which the occasion renders apparently necessary. I say apparently necessary, because all that can reasonably be required of the master so interposing is, that he should act with as much coolness and judgment as are ordinarily possessed by masters of vessels, and should honestly endeavor to do his duty. Such occasions do not permit the degree of force necessary to be used, to be very exactly measured, or the necessity itself to be estimated with the same pre-

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cision which those judging after the event, with time for deliberation, and a more full knowledge of the facts, might find possible.

This law, abolishing the punishment of flogging, does not affect either of these last mentioned powers of the master. They exist now, and are to be governed by the same rules as before that law was passed.

I have only to add, in conclusion, on this topic, that the Act of 1850 is not a penal law. It may, as I have explained to you, have an important effect upon the questions of justifiable cause and malice, on the trial of indictments under the Act of 1835, and also in civil suits for damages; but it describes no offence, and enacts no penalty; and therefore is not one of the criminal laws of the United States, and no indictment can be framed upon it.

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ABANDONMENT.

See ADMIRALTY, 7. INSURANCE, 2, 3, 4.

ABATEMENT.

1. The pendency of a prior suit in a State court is not a good plea in abatement to a suit *in personam* in this court. *White et al. v. Whiteman*, 494.
2. Such a plea must show jurisdiction of the former suit, if pending in a court not under the same sovereignty. *Ib.*
3. The absence of an affidavit, verifying the facts alleged in the plea, is fatal. *Ib.*

ACTION.

A mere sale in one State or country, made with knowledge that the vendee intended to use the property, to violate some positive law of another State or country, can be the foundation of an action in the State or country whose law was intended to be violated. *Sortwell et al. v. Hughes*, 244.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMIRALTY.

1. Where a third person appears and defends a suit in admiralty, in behalf and in the absence of the party to the suit, he is to be treated as a party, and made liable, personally, for the fees of the Clerk of the Court, for services rendered in the cause at his request. *Stover, in the matter of*, 201.
2. Where a decree is made, dismissing a libel in admiralty, "without costs to either party," it merely imports that the parties are not liable

to each other for any costs, but does not affect the liability of a party to the Clerk for his fees for services rendered to such party. *Ib.*

3. If a vessel and cargo be seized as prize, and the owners file a libel on the instance side of the Court, for restitution and damages, the Court will ascertain whether there is a real question of prize, or no prize, to be tried; and if so, will direct the captors to institute prize proceedings. *Fay et al. v. Montgomery*, 266.
4. A captor may forfeit his title by misconduct. *Ib.*
5. It is a clear duty of a captor to send in his prize for adjudication; but he may be excused, if he cannot do it, without so weakening his command, as to endanger the public service. *Ib.*
6. *Quere*, whether mere delay is a ground of forfeiture of the rights of captors. *Ib.*
7. Under the 34th admiralty rule, the underwriter, who has accepted an abandonment, which divests the original claimant of all interest, may be admitted to intervene and become the *dominus litis*, in a suit *in rem*. *The Brig Ann C. Pratt*, 340.
8. The Admiralty will not entertain suits for merely nominal damages in cases of personal torts, not involving any subject-matter beyond such a claim for damages. *Barnett v. Luther*, 434.

See COURTS, (Jurisdiction of,) 6.

AFFIDAVIT.

See ABATEMENT, 3.

AGREEMENT.

An agreement among distributees, that no administration shall be taken, and that one of them, who was the apparent owner of the property at the death of the intestate, should continue to hold and manage it for the joint benefit of all, the intestate being much indebted at the time of his decease, cannot be enforced in equity. *Allen et ux. v. Simons et al.* 122.

APPEAL.

See COURTS, (Jurisdiction of,) 7; PRACTICE, 2.

ASSIGNMENT.

1. An assignment for the benefit of creditors, made by a debtor who has absconded to a foreign country, carrying with him a large sum of money, is fraudulent and void as to creditors, if it contains a stipulation for a release as a condition of obtaining a preference under the assignment. *Stewart et al. v. Spenser et al.* 157.
2. Whether an insolvent debtor, who assigns but a part of his property

for the benefit of all his creditors, can stipulate for a release in Rhode Island, *quære?* *Ib.*

See INSOLVENT LAWS; LIEN, 4; STATUTE, (Construction of,) 9;
WITNESS.

ATTACHMENT AND EXECUTION.

1. An attachment of all the right, title, and interest of the defendant in and to any lands in the country, binds his right of redemption of mortgaged land, and not the fee; and if the execution be extended on the land, the title dates only from the seizure on the execution. *Coggswell v. Warren et al.* 223.
2. By the law of Maine, a mortgagee may extend on the land mortgaged an execution issuing on a judgment for the debt secured by the mortgage. *Ib.*

ATTORNEY.

See PLEADING, 8.

BANKRUPTCY.

1. Lands held for a bankrupt, upon a trust which resulted from the payment of the entire consideration by the bankrupt, before the Bankrupt Act was passed, belong to the assignee. *Carr v. Hilton et al.* 230.
2. If such trust was created to conceal the property from creditors, this might prevent a Court of Equity from lending its aid to the bankrupt to enforce the trust; but the assignee may enforce it, for the benefit of creditors. *Ib.*
3. Lands conveyed to a third person by the bankrupt, without any consideration, upon a secret parol trust in his favor, for the purpose of defrauding creditors, pass to the assignee, although the conveyances were made before the passage of the Bankrupt Act. *Ib.*
4. Under the eighth section of the Bankrupt Act, the cause of action in such a case does not accrue, until the fraud is discovered. *Ib.*
5. The repeal of the Bankrupt Act does not prevent an assignee from instituting suits to reduce the property of the bankrupt to possession. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A transfer of a negotiable note and mortgage to the plaintiff, to indemnify him, he agreeing to retransfer them if indemnified, *held*, not a legal mortgage, but a conveyance in trust. *Warren v. Emerson*, 239.
2. The maker of the note, having acquired the equitable interest of the assignor, may use it in his defence to an action at law on the note. *Ib.*

BOND.

1. A valid promise not to arrest a debtor on the first execution does not,

at law, avoid a bond given by the debtor for the prison liberties, when arrested in violation of such promise, which is collateral merely. *Hawes et al. v. Marchant et al.* 136.

2. A statutory bond for the liberties of the prison, executed by the debtor under duress, is void both as against him and his sureties. *Ib.*
3. But if the debtor, with the knowledge and consent of one of his sureties, claims and exercises the right of being on the liberties by virtue of such a bond, they are estopped to allege its invalidity. *Ib.*

See BOTTOMRY, 1, 2; CONSTITUTIONAL LAW, 3.

BOTTOMRY.

1. A bottomry bond, given for a larger sum than was advanced, for the purpose of deceiving the underwriter on the vessel, is void. *The Brig Ann C. Pratt*, 340.
2. Such a bond cannot be allowed to stand as security for the sum actually advanced. *Ib.*
3. Bottomry is a peculiar contract, differing essentially from a loan with security, and is inconsistent with the existence of the lien implied by the marine law to secure advances to a master in a foreign port to make necessary repairs. *Ib.*
4. When the express contract of bottomry is void for fraud, no recovery can be had upon the footing of an implied contract and lien. *Ib.*

CONSIGNOR AND CONSIGNEE.

See FACTOR.

CONSTITUTIONAL LAW.

1. The words, "the law of the land," in the tenth section of the first article of the Constitution of Rhode Island, mean due process of law; in which is included the right to contest the charge and be discharged, unless it is proved. *Greene v. Briggs et al.* 311.
2. An act of the legislature of that State, which authorizes a criminal prosecution upon a complaint against no person in particular, and not containing a charge of the substantive facts necessary to constitute the offence, is inoperative, because such a complaint is not due process of law. *Ib.*
3. The legislature cannot make the right to a trial by jury, in a criminal case, dependent on giving a bond, with surety, for the payment of the penalty and costs. *Ib.*

CONSTRUCTION.

If an officer's return can be fairly construed so as to be sufficient in law,

it is the duty of the Court so to construe it. *Cogswell v. Warren et al.* 223.

See DEVISE; INSURANCE, 7.

CONSUL.

A foreign consul has authority to petition the Court to order the marshal to pay into the registry proceeds of a sale of property libelled for salvage, in which the citizens or subjects of his country are interested, they being absent, and having no other legal representative in the United States. *Ship Adolph and Cargo*, 87.

See COURTS, (Jurisdiction of,) 8; SHIPPING, 2-4.

COSTS.

See ADMIRALTY, 2; STATUTE, (Construction of.)

COURTS, (Jurisdiction of.)

1. The Circuit Court has concurrent jurisdiction with the Probate Court, to decree an account in favor of distributees. *Mallett et al. v. Dexter*, 178.
2. When two courts have concurrent jurisdiction, the one which first has possession of the subject must adjudicate; and neither of the parties can be forced into another court. *Ib.*
3. An application to the Court to compel one of its officers to pay over money due from him in his official capacity, is a proceeding as for a contempt, and the Court has jurisdiction under the Act of Congress of March 2, 1831. *Pitman, in the matter of*, 186.
4. In such a proceeding, the sworn answers of the officer are evidence in his favor. *Ib.*
5. When both the Judges of the Circuit Court are incompetent, from interest, or having been of counsel, to sit in a cause, it is to be certified to the nearest Circuit Court in this circuit, competent in point of law to try the same. *Richardson v. The City of Boston*, 250.
6. In cases of admiralty appeals and writs of error from the District Court, if the Judge of the Supreme Court assigned to this circuit, cannot sit, for either of the above reasons, the case must be certified to the nearest Circuit Court in the second circuit. *Ib.*
7. This Court will not decline jurisdiction of an appeal, in a case of personal damage, brought by an American seaman, serving on board a British vessel, when the voyage was terminated here, and the master was domiciled in the United States. *Patch v. Marshall*, 452.
8. Though the Court will not call in question the official acts of a British Consul, in a foreign port, respecting the crew of a British vessel, it does not follow that it will not investigate the conduct of the master, in pro-

curing the intervention of the Consul, by which the seaman was imprisoned; if that amounts to a tort, so as to render the master liable for the imprisonment, it stands on the same ground as other torts. *Ib.*

See ABATEMENT, 1, 2; PRACTICE; PROBATE, (Court of.)

DAMAGES.

See ADMIRALTY, 8.

DEPOSITION.

See STATUTE, (Construction of,) 8.

DEVISE.

1. An express limitation in a bequest or devise, should not be held to be controlled by implications drawn from other provisions in the will, if the latter, by any fair intendment, can be reconciled with the former. *Ward et al. v. Amory et al.* 419.
2. A power of disposal by will, does not enlarge an interest in the donee of the power, beyond what is expressly limited. *Ib.*
3. A devise of a fee to trustees and their heirs, with authority to sell, is consistent with an executory bequest of the fee to others, after a life estate. *Ib.*
4. The rule in Shelly's case is not applicable to a devise of an equitable estate for life to the ancestor, and a legal estate, after the termination of the life estate, to the heirs. *Ib.*
5. Where a testatrix empowered a trustee to sell lands, for the purposes of reinvestment, "when the major part of my children shall recommend and advise the same," it was held that the consent of the major part of those living at the time when the sale was made, was sufficient. *Sohier et al. v. Williams et al.* 479.

DISCOVERY.

See PRODUCTION OF PAPERS, 4.

EQUITY.

A Court of Equity will not force on a purchaser a doubtful title; and a title may be doubtful, because it depends on a doubtful interpretation of a will, if all parties who may be interested in the estate are not bound by the decree. *Sohier et al. v. Williams et al.* 479.

See AGREEMENT; BANKRUPTCY, 2; EXECUTOR AND ADMINISTRATOR, 1, 2; FRAUD, 2; HUSBAND AND WIFE; PARTIES; PLEADING, 2-5.

ESTOPPEL.

See BOND, 8.

EVIDENCE.

1. Experts are not allowed to give their opinions on the case, where its facts are controverted; but counsel may put to them a state of facts, and ask their opinions thereon. *United States v. McGlue*, 1.
2. The question, whether a person was held to service under the laws of Virginia, is partly a question of *status*, and partly a question of property; and in either aspect, evidence that the person was, in point of fact, held and treated as a slave in Virginia, is admissible, and if not controlled, sufficient evidence to require the jury to find that he was held to service under the laws of that State. *United States v. Morris*, 23.
3. If an entry does not contain a part of the goods consigned by the same invoice and bill of lading, it is *prima facie* evidence that the duties have not been paid. *United States v. Certain Hogsheads of Molasses*, 276.
4. Evidence that the prisoner uttered as genuine, what purported on its face to be a bank-note, is competent proof that it was a bank-note, though it is not otherwise shown such a bank existed. *United States v. Foye*, 364.
5. Evidence that a statement was made to a court by counsel, in the presence of the complainant, who was not a party, is inadmissible. *Carr v. Hilton*, 390.

See COURTS, (Jurisdiction of,) 4; INSURANCE, 1; LIMITATIONS, (Statute of); PATENT, 2, 4; PLEADING, 5, 6; REVENUE LAWS, 4, 6; WARRANTY, 1.

EXECUTOR AND ADMINISTRATOR.

1. An executor or administrator is a necessary party to a bill to enforce a trust concerning property of the deceased. *Allen et ux. v. Simons et al.* 122.
2. When an administrator is in the process of accounting before a Probate Court, he cannot be compelled to account in this Court, by a bill in equity. *Mallett et al. v. Dexter*, 178.
3. An account of an administrator, though settled by a judicial decree of a court of competent jurisdiction, may be opened for fraud. *Ib.*

See AGREEMENT.

FACTOR.

1. A factor who accepts a bill, drawn against a particular consignment of merchandise, which has been so far executed as to be placed in the hands of a third person, to be delivered to him, acquires thereby a property in the goods, which will enable him to maintain replevin against an attaching creditor of the consignor, to whom the officer making the attachment had delivered the goods. *Nesmith et al. v. Dyeing, Bleaching, and Calendering Co.* 130.

2. No bill of lading, or other formal document, is necessary to create the title in such case, nor is it necessary that the depositary should have been originally employed by the consignee, nor that he should know the particulars of the consignee's title. *Ib.*
3. If a consignee writes a letter to his consignor, and fully informs him what he has done, the silence of the consignee, after a reasonable time, is an approval of his conduct. *Norris et al. v. Cook et al.* 464.
4. Though the consignee in such a case must have plainly disclosed a departure from instructions, and the reasons which induced him to depart from them, he is not bound to detail facts of a general nature, which he may reasonably presume the consignor has knowledge of. *Ib.*

FLOGGING.

1. The Act abolishing the punishment of flogging in the navy, and in vessels of commerce, is not a penal law, and no indictment can be framed upon it. It applies to whaling ships, which are "vessels of commerce," within the meaning of this act. *United States v. Culler*, 501.
2. It prohibits corporal punishment by stripes, inflicted with a cat, and any punishment which in substance and effect amounts thereto. *Ib.*
3. The degree of such punishment is not material; it is the kind of punishment which is alone to be considered. *Ib.*
4. It is a question of fact for the jury, whether the punishment inflicted was, in substance and effect, the punishment of flogging. *Ib.*
5. Under an indictment founded on the third section of the Act of March 3, 1835, (4 Stat. at Large, 776,) if the punishment inflicted was flogging, it was without justifiable cause. *Ib.*
6. But it is incumbent on the government to prove, not only that the act was without justifiable cause, but that it was malicious, that it was a wilful departure from a known duty. If the master knew that his act was illegal, it was malicious in the sense of this Act of 1835. *Ib.*

See CHARGE OF MR. JUSTICE CURTIS, 509.

FRAUD.

1. Fraudulent misrepresentations by a stranger, are not sufficient to rescind a deed of conveyance. *Fisher v. Boody et al.* 206.
 2. They may afford ground for relief, on account of mistake. *Ib.*
- See ASSIGNMENT, 1; BANKRUPTCY, 2-4; BOTTOMRY, 1, 4; EXECUTOR AND ADMINISTRATOR, 3; LIMITATIONS, (Statute of); PLEADING, 2; STATUTE, (Construction of,) 9.

GUARDIAN AND WARD.

1. A statute guardian cannot represent his ward in court, in a matter where his interest is opposed to that of the ward, except by force of

some statute authority, or by an appointment by the court; and no court would appoint such a guardian *ad litem*. *Mathewson v. Sprague et al.* 457.

2. The 10th section of the Act of Rhode Island of 1822, so far as it respects the service of notice to wards on their guardians, is repealed. *Ib.*

HUSBAND AND WIFE.

On a bill by husband and wife, to recover property of the wife, the Court directs a settlement on the wife, unless satisfied, upon a separate examination of the wife, that it is voluntarily waived. *Ward et al. v. Amory et al.* 419.

INDICTMENT.

See FLOGGING, 1, 5; PLEADING, 1, 7, 8; PRACTICE, 1.

INSANITY.

1. An accused person must be presumed to be sane till his insanity is proved. *United States v. McGlue*, 1.
2. It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act, if he knew it was wrong and deserved punishment, he is responsible. *Ib.*
3. If a person suffering under *delirium tremens*, is so far insane as not to know the nature of his act, &c., he is not punishable. *Ib.*
4. If a person, while sane and responsible, makes himself intoxicated, and, while intoxicated, commits murder by reason of insanity, which was one of the consequences of intoxication, and one of the attendants on that state, he is responsible. *Ib.*
5. The law does not presume insanity arose from any particular cause; and if the government asserts that the prisoner was guilty, though insane, because his insanity was drunken madness, this allegation must be proved. *Ib.*

INSOLVENT LAWS.

The assignee of an insolvent debtor, appointed under the laws of the State of Massachusetts, does not so far represent creditors in the State of Rhode Island, as to be able to avoid a conveyance of personal property in the latter State, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island. *Betton v. Valentine*, 168.

See ASSIGNMENT, 1, 2; WITNESS.

INSURANCE.

1. There is no presumption that defects, found to exist in the hull of a

vessel during the voyage, were produced by a peril of the sea. The burden is on the assured to prove this. *Bullard et al. v. Roger Williams Insurance Co.* 148.

2. A letter of abandonment must state the cause of the loss, and when stated, it must appear to have been a peril insured against. *Ib.*
3. If a vessel be so injured by a sea peril as not to be repairable, except at an expense exceeding its value when repaired, the loss is actually total, and no abandonment is necessary. *Ib.*
4. The valuation in the policy fixes the value of the vessel for this purpose under the form of policy used in Boston and some other places. *Ib.*
5. Seaworthiness of the hull is such a state of the hull, as is competent to resist the ordinary action of winds and waves in the voyage for which the vessel is insured. *Ib.*
6. Heavy cross seas are not the ordinary action of the sea, within the meaning of this rule, however common they may be in the voyage insured. *Ib.*
7. Construction of clauses in fire policy respecting subsequent insurance, and termination of interest. *Holbrook et al. v. American Insurance Co.* 193.
8. Meaning of the word *designs*, in a policy of insurance. *Ib.*
9. A conveyance, which equity will treat as a mortgage, does not terminate the interest of the assured. *Ib.*
10. Insurance, made by a mortgagee at the expense of the mortgagor, is subsequent insurance by the mortgagor. *Ib.*

JURISDICTION.

See COURTS, (Jurisdiction of.)

JURY.

1. Under the Constitution and laws of the United States, the jury are not the judges of the law in a trial for a crime; they are to take the law from the Court, and apply it to the facts which they may find from the evidence, and thus frame their general verdict, of guilty or not guilty. *United States v. Morris*, 23.
2. Though neither party has a right of challenge after a juror is sworn, it is in the discretion of the Court to protect the administration of justice, by investigating, at any stage of the trial, an objection to the impartiality of a juror, and by withdrawing the case from the jury, if any juror is found unfit to sit therein. *Ib.*
3. If the jury send a written request for instructions to the Court, when not in session, the Court, after notice to the counsel, will reply in writ-

ing, if it deems it safe and proper to do so. *Norris et al. v. Cook et al.* 464.

See CONSTITUTIONAL LAW, 3; FLOGGING, 4.

JUSTICE OF THE PEACE.

1. An order, made by a justice of the peace, upon a matter not within his jurisdiction, is merely void. *Ib.*
2. He must not only have jurisdiction over the subject-matter, but of the process; and if the law, conferring jurisdiction, is in conflict with the Constitution, so far as it respects the process, the jurisdiction does not exist. *Ib.*

LIEN.

1. By the maritime law, the vendor of materials, who sells them to a mechanic whom he knows to have contracted to make repairs for a stipulated sum, and to whom, exclusively, he gives credit, can have no lien on the vessel. *Smith et al. v. Steamer Eastern Railroad*, 253.
2. Certain mill-owners having, by articles of agreement, associated themselves for the purpose of constructing reservoirs, &c., to improve the flow of the stream, and agreed that there should be a lien on their respective estates for the share of the expenses which each was to pay: *Held*, that this agreement was an equitable lien, which each member who had paid more than his proportion might enforce, without joining the others; and that the defendant, having purchased certain of the mills, with notice of the lien, after the debts were incurred by the association, took the estates *cum onere*. *Clarke v. Southwick*, 297.
3. Such a lien is not barred by lapse of less time than is sufficient, by the local law, to bar a suit for the foreclosure of a legal mortgage. *Ib.*
4. Where an assignment, made by an insolvent debtor, was held voidable, as actually fraudulent as against creditors, and the assignee either had knowledge of the extraneous facts which rendered the assignment voidable by creditors, or the means of knowing them, and was put upon inquiry, it was held, that he had no lien as against an attaching creditor, upon proceeds of the property assigned, for his services in partially executing the trusts, or for retainers paid to counsel. *Hastings et al. v. Spenser et al.* 504.

See BOTTOMRY, 2, 3, 4; STATUTE, (Construction of,) 5, 6.

LIMITATIONS, (Statute of.)

To avoid the bar of the statute of limitations, the complainant must not only allege his ignorance of the fraud, but when and how it was discovered; and must offer satisfactory evidence to prove these averments. *Carr v. Hilton*, 390.

LIQUOR.

See ACTION; CONSTITUTIONAL LAW; JUSTICE OF THE PEACE;
STATUTE, (Construction of,) 4.

MARTIAL LAW.

1. A military officer, acting under the law martial, is justified by an order from a superior officer, apparently within the scope of his authority. *Despan v. Olney*, 306.
2. If the superior has secretly abused his power, he, and not the inferior who executes the order, is answerable. *Ib.*

MASTER AND MARINERS.

See SALVAGE, 4; SHIPPING; STATUTE, (Construction of,) 7; WAGES.

MORTGAGE.

See ATTACHMENT AND EXECUTION; BILLS OF EXCHANGE AND
PROMISSORY NOTES.

MURDER.

A blow, with a dangerous weapon, calculated to produce, and actually producing, death, if struck without such provocation as reduces the crime to manslaughter, is deemed by the law malicious, and the killing is murder. *United States v. McGlue*, 1.

See INSANITY, 4.

NAVY AGENT.

The payment of navy and privateer pensions, under the orders of the Secretary of the Navy, does not constitute the person paying them an officer of the United States; and if the person thus disbursing the public money at the same time holds the office of Navy Agent, he cannot be allowed any extra pay or emolument for making such disbursements. *Browne v. United States*, 15.

NEW TRIAL.

1. A new trial will not be granted because the verdict is against the evidence, unless the Court can clearly see that the jury must have unconsciously fallen into some mistake, or been actuated by some improper motive. *Wilkinson et al. v. Greely*, 63.
2. If a party who is surprised at the trial, allows it to proceed, without making his surprise known and applying for delay, and the verdict is against him, he cannot have a new trial by reason of that surprise. *Carr v. Gale et al.* 384.

3. A new trial will not be granted because a witness, who gave a loose estimate of an amount at the trial, has since become satisfied his estimate was too large. *Ib.*
4. Nor to contradict a witness, as to a fact of no considerable importance, by negative evidence, given nearly ten years after the event testified to. *Ib.*
5. Nor to impeach a witness, or disprove a statement which did not materially affect the legal aspect of the case. *Ib.*

NOTICE.

1. Information, which makes it the duty of a party to make inquiry, and shows where it may be effectually made, is notice of all facts to which such inquiry might have led. *Carr v. Hilton*, 390.
 2. But a party, thus put on inquiry, is to be allowed a reasonable time to make it, before he is affected with notice. *Ib.*
- See FACTOR, 3, 4; GUARDIAN AND WARD, 2; STATUTE, (Construction of,) 8, 11.

PARTIES.

The tenant for life, together with the contingent remainder-man in fee may represent the inheritance in a bill for specific performance, though their interests are merely equitable, provided the issue of the remainder-man will take, if he fails to do so by reason of the contingency. *Sohier et al. Williams et al.* 479.

See ADMIRALTY, 1, 7; EQUITY; EXECUTOR AND ADMINISTRATOR, 1; LIEN, 2.

PATENT.

1. A sale of the thing patented, to an agent of the patentee, employed by him to make the purchase, on account of the patentee, is not, *per se*, an infringement. *Byam et al. v. Bullard et al.* 100.
2. Accompanied by other circumstances, it may be evidence of an infringement. *Ib.*
3. Though the use of an equivalent may be an infringement, yet if the specification and claim expressly declare that such equivalent is not embraced within the invention, its use does not infringe. *Byam et al. v. Farr et al.* 260.
4. An exclusive possession of about eight years, under a patent for a useful machine, affecting the business of a large class of persons, is sufficient *primâ facie* evidence to entitle the patentee to an injunction previous to a trial at law. *Foster v. Moore*, 279.

5. The mere substitution of one known device, for another, though complex, is an infringement. *Ib.*
6. What is technically a combination, and how it may be infringed, though improved. *Ib.*

PLEADING.

1. It is not a good plea, in bar to an indictment for a misdemeanor, that the case was once committed to a jury, and withdrawn before verdict by order of the Court. *United States v. Morris*, 23.
2. If a bill charges fraud, as the ground of relief, it must be proved; and the proof of other facts, though included in the charge, and sufficient, under some circumstances, to constitute a claim to relief under another head of equity, will not prevent the bill from being dismissed. *Fisher v. Boody et al.* 206.
3. Though lapse of time be not pleaded as a bar, the judgment of the Court will be influenced by delay, not accounted for, when the bill seeks to rescind a sale. *Ib.*
4. Lying by, and acquiescence, may be sufficient to induce the Court to refuse to rescind a deed, though not pleaded as a bar. *Ib.*
5. If a bill to rescind a deed is filed, after a considerable lapse of time, and the exercise by the plaintiff of the powers of an owner over the property, so as to change its character or value materially, the bill must state sufficient reasons for the delay; and those reasons must be made out in proof. *Ib.*
6. The description of the termini, between which a letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid. *United States v. Foye*, 364.
7. It is necessary, in an indictment for larceny from a letter, under the 21st section of the act, to lay the property stolen on some person other than the prisoner. *Ib.*
8. Under what circumstances a person indicted for a misdemeanor, may plead by attorney. *United States v. Mayo*, 433.

See EXECUTOR AND ADMINISTRATOR, 1, 2; LIMITATIONS, (Statute of.)

POST-OFFICE.

A letter, containing money, deposited in the mail, for the purpose of ascertaining whether its contents were stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by post within the meaning of the Post-Office Act. (4 Stat. at Large, 102.) *United States v. Foye*, 364.

See PLEADING, 6, 7.

PRACTICE.

1. Under the Act of Congress of August 8, 1846, (9 Stats. at Large, 73, s. 3,) an indictment for a misdemeanor may be remitted to this Court, by an order made at a term subsequent to that to which the indictment is returned, and after the defendant has pleaded, and some proceedings have been had. *United States v. Morris*, 23.
2. An appeal from the District Court is properly entered at the term of the Circuit Court, begun next after the entry of the decree in the District Court, although the term of the District Court, during which the decree was entered, had not been ended when the term of the Circuit Court was begun. *The United States v. Certain Hogsheads of Molasses*, 276.

See ADMIRALTY, 1, 2, 7, 8; JURY, 3; PRODUCTION OF PAPERS.

PRISON LIBERTIES.

See BOND, 1, 2, 3.

PRIZE.

See ADMIRALTY, 3-6.

PROBATE, (Court of.)

1. The Court of Probate has only a special and limited jurisdiction, and must act in the manner prescribed by statute: otherwise its acts are void. If it make a decree without notice, when the statute requires notice, a party entitled to notice may treat its decree as void. *Mathewson v. Sprague et al.* 457.
2. In Rhode Island, the Probate Court has exclusive jurisdiction of the probates of wills of lands. *Ib.*

PRODUCTION OF PAPERS.

1. The 15th section of the Act of September 24, 1789, (1 Stat. at Large, 82,) empowering the Courts of the United States to compel the production of books and papers in trials at law, has so far altered the common law as to inflict upon the party the penalty of a nonsuit or default, upon the non-production of a paper, instead of merely letting in the opposite party to parol proof. *Iasigi et al. v. Brown et al.* 401.
2. An order to produce may be applied for before trial, upon notice. *Ib.*
3. A *prima facie* case of the existence of the paper, and its materiality, must be made out, and the Court will then pass an order *nisi*, leaving the opposite party to produce, or show cause at the trial, where alone the materiality can be finally decided. *Ib.*
4. The fact that a bill of discovery has been filed and answered, but the papers not produced, is not a bar. *Ib.*

PROTEST.

1. The merchant, in his suit to recover duties paid under protest, must be confined to such grounds of objection to the payment thereof as his protest contains. *Norcross et al. v. Greely*, 114.
2. A protest under the Act of February 26, 1845, (5 Stat. at Large, 727,) being a commercial document, need not be drawn with technical accuracy; but it must state, distinctly, every ground of objection intended to be relied on; and none other can be relied on at the trial. *Swanston et al. v. Morton*, 294.
3. It must also show, distinctly, what is objected to. *Ib.*
4. Under the Act of February 25, 1845, (5 Stat. at Large, 727,) requiring a protest in writing, at or before the payment of duties, to enable the party paying to maintain an action, no substantive ground of objection to the payment, not contained in the protest, can be taken at the trial. *Kriesler v. Morton*, 413.
5. A protest having stated only, that the invoice value was correct, the plaintiff was not allowed to show that the appraisement was not made in conformity to law. *Ib.*
6. The fact that the Deputy Collector dictated the form of the protest, does not estop the Collector from denying its sufficiency for a purpose, which does not appear to have been brought to the notice of the Deputy Collector. *Ib.*

See STATUTE, (Construction of,) 3.

RETURN.

See CONSTRUCTION.

REVENUE LAWS.

1. In revenue causes, it is particularly important that the verdict should be the result of a full and careful investigation of the questions of fact. *Wilkinson et al. v. Greely*, 63.
2. The sixteenth section of the Tariff Act of August 30, 1842, (5 Stat. at Large, 563,) is not repealed by the Tariff Act of July 30, 1846, (9 Stat. at Large, 42,) and still prescribes the rule for ascertaining the dutiable value of merchandise, procured by purchase, on which an *ad valorem* duty is imposed. *Barnard et al. v. Morton*, 404.
3. The expense of sacks, in which salt is packed for importation from Liverpool, is embraced under the words "all costs" in that section, and is to be added to the market value, to ascertain the dutiable value. *Ib.*
4. A Collector, who has compelled an importer to pay a higher rate of

duty than that imposed by law on such articles as are named in the invoice, has the burden of proof to show the authority under which such higher duty was exacted. *Wilkinson et al. v. Greely*, 439.

5. When the question is, whether samples bore a particular name in commercial transactions, it is necessary they should have been so known generally, and not in particular places, to the exclusion of others, or to particular persons only. *Ib.*
6. On this question, negative evidence, from those engaged in the trade, has much weight. *Ib.*
7. If articles, identical with the samples, were not generally known, the question whether the diversities were material arises; and this may be a question of law when the facts are ascertained. A change, which renders an article substantially different as an article of commerce, and adapts it to all the uses of another article, on which a higher rate of duty is levied, destroys its legal identity, and is a material change under the revenue law. *Ib.*

See EVIDENCE, 8; PROTEST; STATUTE, (Construction of,) 2, 3, 7.

RULE IN SHELLY'S CASE.

See DEVISE, 4.

SALE.

See ACTION; PATENT, 1, 2; STATUTE, (Construction of,) 4; WARRANTY.

SALVAGE.

1. What constitutes a salvage service. *Hennessey et al. v. The Ship Versailles and Cargo*, 353; *Williamson v. The Brig Alphonso and Cargo*, 376.
2. What is necessary to displace the ordinary principles of adjudication, touching such service. *Hennessey et al. v. The Ship Versailles and Cargo*, 353.
3. The elements upon which the amount of compensation depends. *Ib.*
4. The master has no right to compel the mate to perform a salvage service; and if he does perform one by the order of the master, without objection, he is to be considered as a volunteer. *Williamson v. The Brig Alphonso and Cargo*, 376.

See CONSUL.

SEAWORTHINESS.

See INSURANCE, 5, 6.

SETTLEMENT.

See HUSBAND AND WIFE.

SLAVE.

See EVIDENCE, 2.

SHIPPING.

1. It is the duty of the master to interpose and quell an affray between the mate and the crew, and to use such means, and such a degree of force as a competent master, of ordinary coolness, judging of the emergency upon the instant, might fairly deem necessary. *Jordan v. Williams*, 69.
2. Under the Act of Congress of July 20, 1840, s. 16, the phrase, "to lay their *complaints* before the consul," applies only to such causes of complaint as are specified in the act, viz., that the mariner is detained contrary to his agreement, or that the vessel is unseaworthy, &c., &c., and not to affrays or quarrels between the officers and crew. *Ib.*
3. The liberty given to the crew by said act, to lay their complaints before the consul, is to be exercised under the fair and reasonable discretion of the master of the vessel, as to the time and mode of landing; and a refusal of duty on the part of the crew, because such permission is not given, would be justifiable only when such refusal is necessary to prevent the loss of the right. *Ib.*
4. Since the passage of the Act of July 20, 1840, when the master of a vessel, in a foreign port, lays a complaint against any of his crew fully and fairly before the consul, and the complaint is such that a competent master may fairly believe it to be within the consul's jurisdiction, and the consul, upon examination, finds it expedient or necessary to make use of the local authorities to keep the men safely, the master is not responsible for their imprisonment as for a *tort*, the consul being answerable to the injured party for any malversation or abuse of power. *Ib.*
5. The detention by the master of the clothes of men imprisoned by the local authorities upon request of the consul, by reason of information given him by the master, while still belonging to the vessel, and also after their discharge therefrom, is a breach of duty on the part of the master. *Ib.*
6. Where a master hires a vessel "on shares," under an agreement to victual and man the vessel, and employ her in such voyages as he thinks best, having thereby the entire possession, command, and navigation of the vessel, and the relation of principal and agent not existing between

the master and owners, the master thereby becomes the owner *pro hac vice*, during such time as the contract exists; and he, and not the general owner, is responsible for necessary supplies. *Webb et al. v. Peirce*, 104.

See FLOGGING; WAGES.

SPIRITUOUS LIQUORS.

See ACTION; CONSTITUTIONAL LAW; JUSTICE OF THE PEACE; STATUTE, (Construction of,) 4.

STATUTE, (Construction of.)

1. The eighth section of the Act of February 8, 1799, (1 Stat. at Large, 626,) does not direct the fees paid by the claimant to the officers of the court, to be repaid by the United States; it applies only to the costs of the prosecution, not of the defence. *Stover, in the matter of*, 93.
2. The Tariff Act of 30th of August, 1842, explained by the Act of 3d of March, 1851, provides, that the value of the article upon which the duty is to be charged shall be ascertained in a certain manner, and that "to such value or price shall be added all costs and charges except insurance, and including in every case a charge for commissions at the usual rates." *Held*,
 1. That by the proper construction of this clause of the Act, a commission should, in all cases, be added to the invoice value, although in fact no commission is paid, and although it is not customary for the importers of the article in question to pay any commission.
 2. That where the rate of the commission charged and added by the collector, is that prescribed by the Secretary of the Treasury as the usual one, it is incumbent upon the merchant to show that it is higher than the rate usually paid, when any commission is paid. *Norcross et al. v. Greely*, 114.
3. The Act of 26th of February, 1845, requires, that no action shall "be maintained against any collector to recover the amount of duties so paid, under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." The merchant paid duties upon commissions, under protest, and the protest set forth this ground of objection alone to such payment,—that the merchant "pays no such commission:" *Held*, that the protest was insufficient, and that, consequently, the action could not be maintained. *Ib.*
4. A statute, inflicting a penalty on a sale, extends only to executed

- sales, by which the property passes from the vendor to the vendee, and not to mere executory contracts, especially if they are declared void by another statute of the same State. *Sortwell et al. v. Hughes*, 244.
5. The Act of Massachusetts, (Stat. 1848, c. 290,) does not give a lien for materials sold, to a person who has contracted with the owner of a vessel to make certain repairs for a stipulated sum, the vendor having notice of such contract. *Smith et al. v. Steamer Eastern Railroad*, 253,
 6. The object of the Act was to create liens on domestic vessels for repairs, supplies, &c., to the same extent as the general maritime law gives such liens on foreign vessels. *Ib.*
 7. Under the 30th section of the Collection Act of 1799, (4 Stat. at Large, 649,) if the master make report of arrival, he is not liable to the penalty, though he do not repair to the office of the principal officer of customs for that purpose. *United States v. Rendall*, 369.
 8. The Judiciary Act, section thirtieth, requires personal service on the adverse party, of the notice of taking a deposition; and service, by leaving a copy at his place of abode, is not sufficient. *Carrington v. Simson*, 437.
 9. In construing the statute of Rhode Island to prevent fraudulent conveyances, this Court follows the construction settled by the highest Court of that State. *Heydock et al. v. Stanhope et al.* 471.
 10. By the law of Rhode Island, an assignment of the property of an insolvent debtor, for the benefit of all his creditors, stipulating for a release, and that the dividends of creditors refusing to become parties shall be paid to the assignor, is not fraudulent and void on its face. *Ib.*
 11. The thirteenth section of the Act of Rhode Island, "concerning towns," &c., (Digest, 299,) requires notice to the inhabitants before an action on the case is brought against the treasurer, for damages suffered by reason of a defect in a highway, which the town was bound to keep in repair. *Holland v. The Town Treasurer of Cranston*, 497.
- See BANKRUPTCY, 4, 5; CHARGE OF MR. JUSTICE CURTIS, p. 509; FLOGGING, 1, 2, 3, 5, 6; GUARDIAN AND WARD, 2; PRACTICE, 1; REVENUE LAWS, 2, 3.

TRUST AND TRUSTEES.

The quantity of estate taken by trustees depends on the purposes of the trust. *Ward et al. v. Amory et al.* 419.

See BANKRUPTCY, 1, 2, 3; BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

WAGES.

In a suit *in rem* by a mate, to recover his wages under the shipping arti-

cles, the Court cannot investigate an allegation of misconduct as master, while in the temporary command of the vessel as master in a voyage, during which the master was not on board with a view of inflicting a forfeiture of wages as master. *Gray v. The Brig Ann C. Pratt &c.* 335.

WARRANTY.

1. If a representation is made in the course of a negotiation for a sale, and the contract of sale is afterwards reduced in writing and signed, and does not contain the representation, it is excluded from the contract, and does not amount to a warranty. *Isaacson &c. v. Rhodes*, 26.
2. Where a writing was signed, which stated that a sale had been made, and described the article sold, and the price and terms of credit, it was held to be the written contract of sale; and that representations in letters, written before the making of the contract, and not referred to therein, could not be received to prove a warranty. *Id.*

WILL.

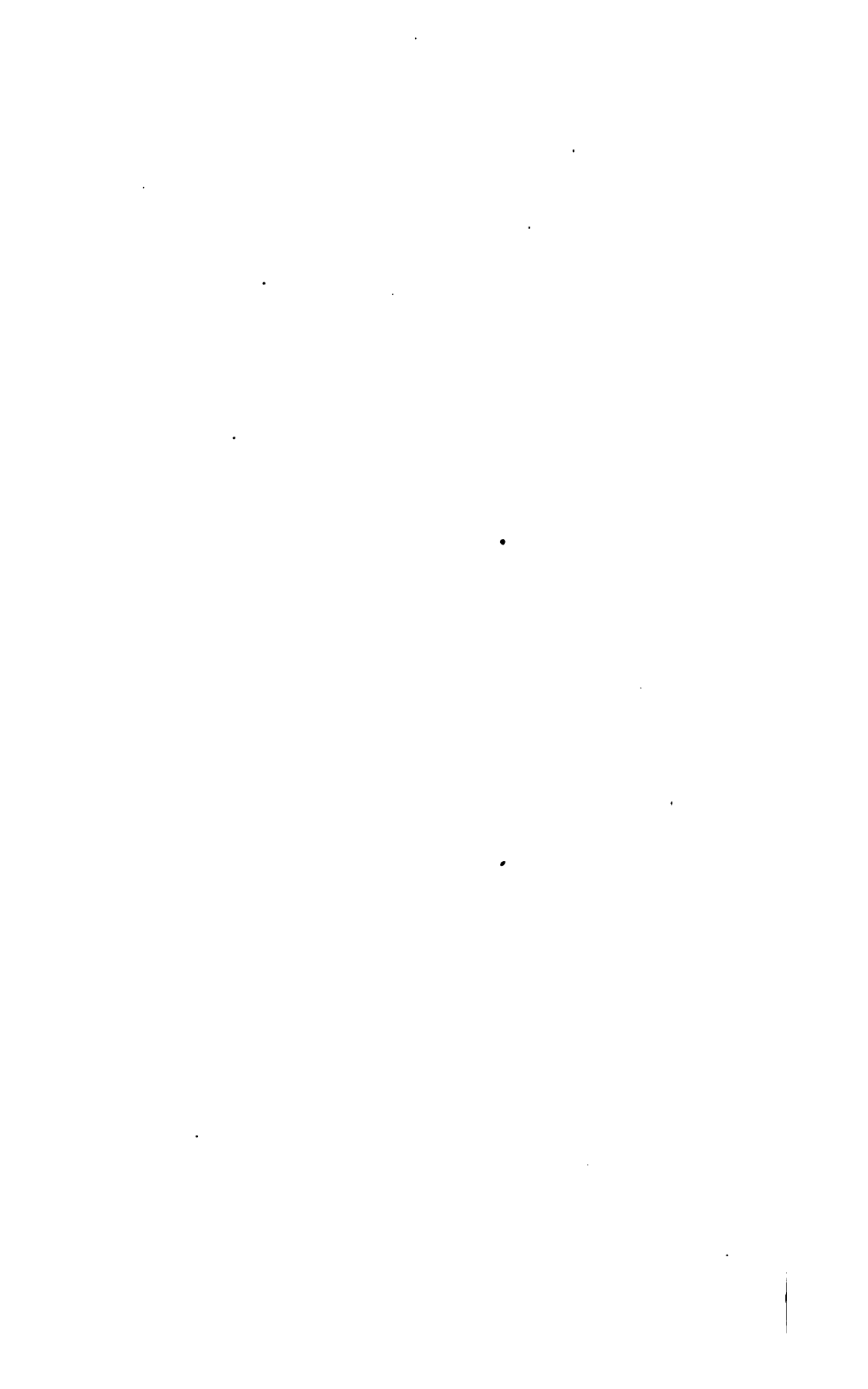
See DEVISE.

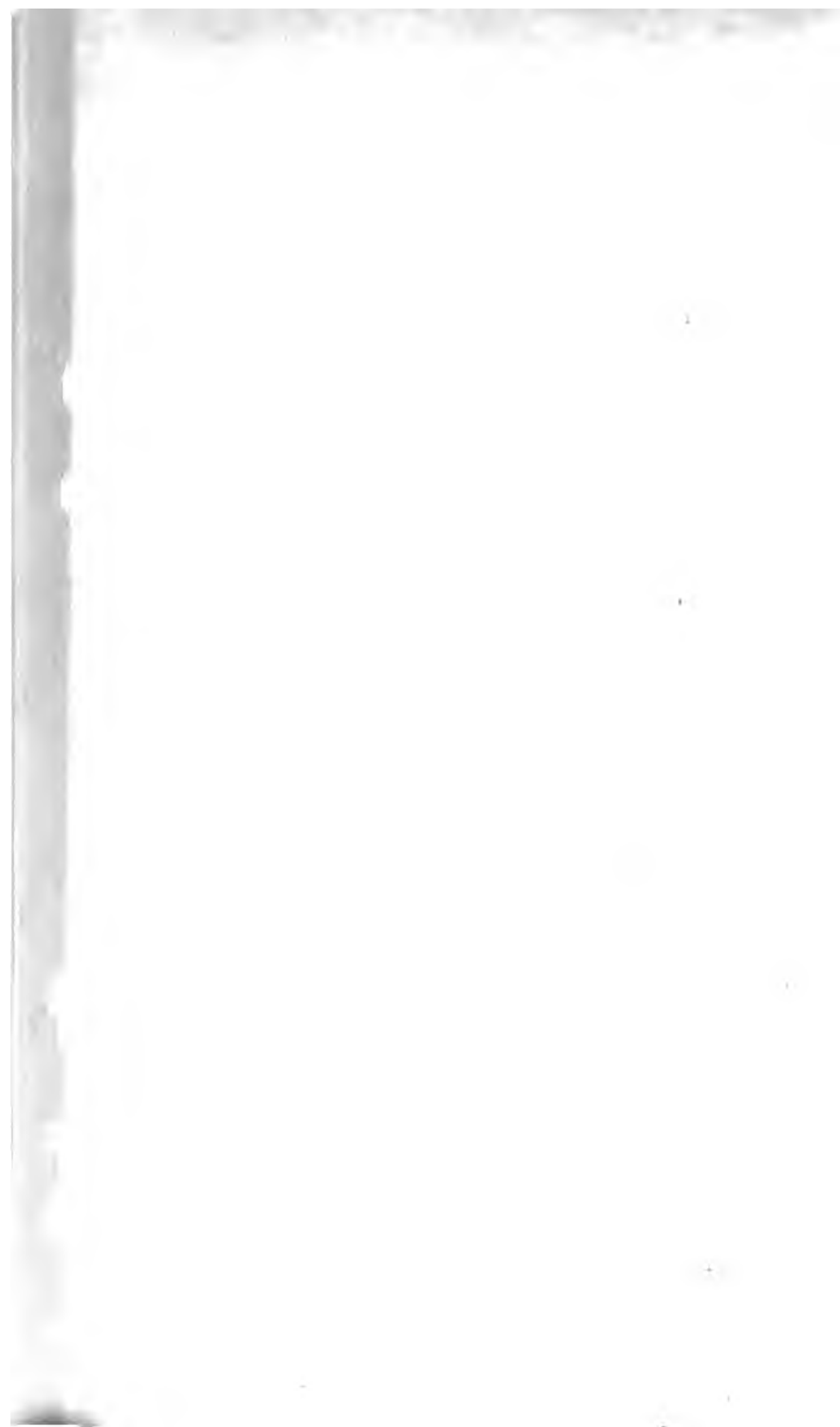
WITNESS.

A creditor of a bankrupt is not a competent witness for the assignee, in a suit to increase the estate. *Carr v. Hixon*, 296.

See EVIDENCE, 1; NEW TRIAL, 2, 4, 5.









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